

No. 88-1434-CFX  
Status: GRANTED

Title: Elizabeth Dole, Secretary of Labor, et al.,  
Petitioners  
v.  
United Steelworkers of America, et al.

Docketed:  
February 27, 1989

Court: United States Court of Appeals  
for the Third Circuit

Vide:  
88-1075

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Entry	Date	Note	Proceedings and Orders
1	Feb 27 1989	G	Petition for writ of certiorari filed.
3	Mar 15 1989		Order extending time to file response to petition until April 3, 1989.
4	Apr 3 1989		Brief amicus curiae of National Assn. of Manufacturers filed. VIDED.
5	Apr 3 1989		Brief amicus curiae of Business Council on the Reduction of Paperwork filed. VIDED.
6	Apr 3 1989		Brief of respondents United Steelworkers of America, AFL-CIO in opposition filed. VIDED.
7	Apr 3 1989		Brief of respondent Public Citizen in opposition filed.
8	Apr 3 1989		Brief amicus curiae of Lawton Chiles filed.
9	Apr 5 1989		DISTRIBUTED. April 21, 1989
10	Apr 5 1989		REDISTRIBUTED. April 21, 1989
12	Apr 19 1989	X	Reply brief of petitioners Dole, etc., et al. filed.
13	Apr 24 1989		REDISTRIBUTED. April 28, 1989
14	Apr 24 1989		REDISTRIBUTED. April 28, 1989
16	May 1 1989		REDISTRIBUTED. May 11, 1989
17	May 1 1989		REDISTRIBUTED. May 11, 1989
18	May 15 1989		Petition GRANTED. *****
19	Jun 29 1989		Brief of respondents Associated Builders and Contractors, et al. filed.
20	Jun 29 1989		Brief amicus curiae of Business Council on the Reduction of Paperwork filed.
21	Jun 29 1989		Brief amicus curiae of National Wholesale Druggists' Assn. filed.
22	Jun 29 1989		Brief amici curiae of National-American Wholesale Grocers' Assn., et al. filed.
23	Jun 29 1989		Joint appendix filed.
24	Jun 29 1989		Brief amicus curiae of Lawton Chiles filed.
25	Jun 29 1989		Brief of United States filed.
27	Jul 19 1989		Order extending time to file brief of respondent on the merits until August 14, 1989.
28	Aug 3 1989		Brief amici curiae of Action Alliance of Senior Citizens, et al. filed.
29	Aug 14 1989		Brief of respondents United Steelworkers, et al. filed.
31	Aug 28 1989		SET FOR ARGUMENT MONDAY, NOVEMBER 6, 1989. (4TH CASE)
30	Aug 31 1989		Record filed.
		*	Certified copy of partial proceedings received.

Entry	Date	Note	Proceedings and Orders
32	Sep 8 1989	G	Application (A89-204) to extend the time to file a reply brief from September 13, 1989 to September 20, 1989, submitted to Justice Brennan.
33	Sep 13 1989		Application (A89-204) granted by Justice Brennan extending the time to file until September 20, 1989.
34	Sep 13 1989		CIRCULATED.
35	Sep 20 1989	X	Reply brief of petitioners Dole, etc., et al. filed.
36	Nov 6 1989		ARGUED.

UNITED STATES DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
WASHINGTON, D.C. 20530

ELIZABETH DICK, SECRETARY  
OF LABOR, ET AL. PETITIONERS

UNITED STEELWORKERS OF AMERICA, ET AL.

PETITION FOR A WRIT OF HABEAS CORPUS  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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### **QUESTION PRESENTED**

The Paperwork Reduction Act of 1980 requires, among other matters, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved three provisions of the Secretary of Labor's hazard communication standard, which requires employers to communicate chemical hazard information to their employees. The question presented, which arises in a contempt action against the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health, is whether the Paperwork Reduction Act's review process applies to agency regulations, developed as part of the agency's statutory mission, that require regulated entities to collect information for disclosure to third parties.

### PARTIES TO THE PROCEEDING

The petitioners are the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health. The following parties participated in the proceeding that is the subject of this petition: the United Steelworkers of America; Public Citizen, Inc.; Building and Construction Trades Department, AFL-CIO; Associated Builders and Contractors, Inc.; Associated General Contractors of America; Construction Industry Trade Associations; and United Technologies Corporation.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

ELIZABETH DOLE, SECRETARY  
OF LABOR, ET AL., PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Acting Solicitor General, on behalf of Elizabeth Dole, Secretary of Labor, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 855 F.2d 108.

### JURISDICTION

The judgment of the court of appeals (App., *infra*, 14a-17a) was entered on August 19, 1988. Petitions for rehearing were denied on November 28, 1988 (App., *infra*, 18a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3504(c) of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, provides in pertinent part:

(1)

The information collection request clearance and other paperwork control functions of the Director shall include:

- (1) reviewing and approving information collection requests proposed by agencies;
- (2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

\* \* \* \* \*

44 U.S.C. 3504(c).

Section 3502(11) defines the term "information collection request" as:

a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information.

44 U.S.C. 3502(11) (Supp. IV 1986).

Section 3502(4) defines the term "collection of information" as:

the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either —

- (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

- (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. 3502(4).

Section 3508 provides:

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

44 U.S.C. 3508.

Section 3518 provides in pertinent part:

- (a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

\* \* \* \* \*

- (e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

## 44 U.S.C. 3518.

The Office of Management and Budget's regulations implementing the Paperwork Reduction Act, which were recently revised (53 Fed. Reg. 16,618 (1988)), provide in pertinent part:

Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure is not included within this definition.

5 C.F.R. 1320.7(c)(2).

## STATEMENT

## A. The Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, is intended to minimize the burden and maximize the usefulness of the federal government's collection and dissemination of information. See 44 U.S.C. 3501. The PRA assigns principal responsibility for this task to the Director of OMB, who is accountable, among other matters, for developing federal information policies and overseeing their implementation. See 44 U.S.C. 3504(a), (b). The PRA specifically provides:

The information collection request clearance and other paperwork control functions of the Director

shall include:

- (1) reviewing and approving information collection requests proposed by agencies;
- (2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

\* \* \* \* \*

44 U.S.C. 3504(c). The PRA defines the term "agency" to include virtually all executive departments, government corporations, and independent regulatory agencies. See 44 U.S.C. 3502(1), (10). It defines the term "information collection request" as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). The PRA defines the term "collection of information" as:

the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either —

- (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
- (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. 3502(4). The PRA defines the term "record-

keeping requirement" as a "requirement imposed by an agency on persons to maintain specified records" (44 U.S.C. 3502(17) (Supp. IV 1986)), and it defines the term "practical utility" as "the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion" (44 U.S.C. 3502(16) (Supp. IV 1986)).

The PRA provides that each federal agency "shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner and for complying with the information policies, principles, standards, and guidelines prescribed by the Director." 44 U.S.C. 3506(a). Furthermore, a federal agency "shall not conduct or sponsor the collection of information" unless (1) the agency has taken action to reduce the paperwork burden; (2) the agency has submitted the proposed information request to the Director of OMB; and (3) "the Director has approved the proposed information collection request, or the period for [the Director's] review of information collection requests \* \* \* has elapsed." 44 U.S.C. 3507(a) (1982 and Supp. IV 1986).<sup>1</sup>

<sup>1</sup> An agency is required to submit a copy of a proposed rule containing collection of information requirements to the Director no later than the date of the publication of the notice of proposed rulemaking. 44 U.S.C. 3504(h)(1). The Director then has 60 days in which to file public comments on the rule's collection of information requirements. 44 U.S.C. 3504(h)(2). In publishing its final rule, the agency must "explain how any collection of information requirement contained in the final rule responds to the comments \* \* \* or explain why it rejected those comments." 44 U.S.C. 3504(h)(3). The Director may, within 60 days of publication of the final rule, disapprove any collection of information requirement contained in the final rule if he determines that the agency's response is unreasonable or if the agency, without notice, substantially modifies the collection of information requirement contained in the proposed rule. 44 U.S.C. 3504(h)(5)(C), (D).

"Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the function of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information." 44 U.S.C. 3508.<sup>2</sup>

The PRA instructs the Director of OMB to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. 3516. The PRA also specifies the effect of the Act on existing law. It states:

Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

44 U.S.C. 3518(a). The PRA further provides:

Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

44 U.S.C. 3518(e).

<sup>2</sup> The PRA provides that, in the case of independent regulatory agencies, the Director's disapproval "may be voided, if the agency, by a majority vote of its members overrides the Director's disapproval" (44 U.S.C. 3507(c)).

## B. The OMB Regulations

The Director of OMB has promulgated regulations, pursuant to 44 U.S.C. 3516, implementing the PRA. See 5 C.F.R. 1320 *et seq.* The regulations, which were first issued in 1983 (48 Fed. Reg. 13,689) and were revised in 1988 (53 Fed. Reg. 16,618), supplement the statute's requirements with additional practical guidance on the meaning of statutory terms and the manner in which OMB shall conduct its paperwork review.

For example, the OMB regulations provide extensive guidance on the practical application of the statutory term "collection of information." See 5 C.F.R. 1320.7(c). As explained above, the PRA defines the term as "the obtaining or soliciting of facts or opinions by the agency" (44 U.S.C. 3502(4)). The OMB regulations interpret that phrase as including "any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). The PRA also specifies that a "collection of information" may be conducted through various means including "reporting or recordkeeping requirements, or other similar methods" (44 U.S.C. 3502(4)). The OMB regulations explain that a "[r]ecordkeeping requirement" \* \* \* includes requirements that information be maintained or retained by persons but not necessarily provided to an agency" (5 C.F.R. 1320.7(r)) and that a "[r]eporting requirement" means a requirement imposed by an agency on persons to provide information to another person or to the agency" (5 C.F.R. 1320.7(s)).<sup>3</sup> More generally, the OMB regulations state:

<sup>3</sup> The OMB regulations further explain that "[s]imilar methods may include contracts, agreements, policy statements, plans, rules or regulations, planning requirements, circulars, directives, instructions, bulletins, requests for proposal or other procurement requirements, interview guides, disclosure requirements, labeling requirements, telegraphic or telephonic requests, and standard questionnaires used to monitor compliance with agency requirements." 5 C.F.R. 1320.7(c)(1).

Requirements by an agency or a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. \* \* \*.

### 5 C.F.R. 1320.7(c)(2).

The OMB regulations set forth the general requirements that an agency must meet to obtain the Director's approval, pursuant to 44 U.S.C. 3507 and 3508, of an information collection request. See 5 C.F.R. 1320.4. First, an agency must demonstrate, in accordance with the statutory criteria, that "it has taken every reasonable step to ensure that:

- (1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;
- (2) The collection of information is not duplicative of information otherwise accessible to the agency; and
- (3) The collection of information has practical utility. \* \* \*."

5 C.F.R. 1320.4(b). Next, OMB determines, in accordance with 44 U.S.C. 3508, "whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions." 5 C.F.R. 1320.4(c). "In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility." 5 C.F.R. 1320.4(c).<sup>4</sup> In

<sup>4</sup> "In determining whether the information has 'practical utility,' OMB will take into account whether the agency demonstrates actual

addition, "OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation." 5 C.F.R. 1320.4(c)(1).

### C. The Present Dispute

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651(b)). To accomplish this goal, the OSH Act authorizes the Secretary of Labor "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce" (29 U.S.C. 651(b)(3)). These standards "require[ ] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 U.S.C. 652(b)(8)). See 29 U.S.C. 655. The Secretary has promulgated numerous standards regulating occupational exposure to various chemical hazards. See 29 C.F.R. 1900.1000-1900.1101.<sup>5</sup> This suit arises out of the Secretary

timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." 5 C.F.R. 1320.7(q).

<sup>5</sup> The OSH Act prescribes a special requirement for such standards, stating (29 U.S.C. 655(b)(5)):

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

of Labor's efforts to promulgate a comprehensive hazard communication standard, pursuant to the OSH Act, for the purpose of "ensur[ing] that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees" (29 C.F.R. 1900.1200(a)(1)). The question is whether the Secretary's hazard communication standard is subject to OMB review in accordance with the PRA.

The Secretary first published a hazard communication standard in 1983. That standard, which was limited to the manufacturing sector of the economy, required covered employers to inform their employees of all hazardous substances to which they are exposed in the workplace through the use of container labels, material safety data sheets (MSDSs), and employee training programs. See 29 C.F.R. 1910.1200(a)(2) (1984); 48 Fed. Reg. 53,280 (1983). OMB reviewed and approved the standard's collection of information requirements (*ibid.*). A number of states and employee interest groups objected to the standard on various other grounds and sought judicial review.<sup>6</sup>

The court of appeals rejected most of the challenges to the Secretary's hazard communication standard. See *United Steelworkers of America v. Auchter (USWA I)*, 763 F.2d 728 (3d Cir. 1985). The court disagreed, however, with the Secretary's decision to limit the standard's coverage to the manufacturing sector. The Secretary had explained that he was limiting the standard's coverage based on his determination "to first regulate those industries with the greatest demonstrated need" (48 Fed. Reg. at 53,286). The court concluded, however, that there was record evidence justifying extension of the standard to

<sup>6</sup> The OSH Act specially provides for judicial review of occupational safety and health standards in the court of appeals, and it further provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. 655(f).

the non-manufacturing sectors. It therefore directed the Secretary:

to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

*USWA I*, 763 F.2d at 736-738, 739.

In response to the court's order, the Secretary reopened the record to gather additional evidence about the economic and technological feasibility of applying the hazard communication standard to non-manufacturing industries. See 50 Fed. Reg. 48,794 (1985). Based on this newly acquired evidence and on the previous rulemaking record, the Secretary commenced drafting a proposed rule that he expected to publish for notice and comment followed by promulgation of a final rule in early 1988. See 52 Fed. Reg. 31,852, 31,854 (1987). Certain parties to the *USWA I* litigation objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the existing record and directed, under threat of contempt sanctions, that the Secretary:

within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

*United Steelworkers of America v. Pendergrass (USWA II)*, 819 F.2d 1263, 1270 (3d Cir. 1987) (footnote omitted).

Although the federal government disagreed with that ruling, the Solicitor General, after rehearing was denied, determined not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852 (1987). In addition to the extended coverage, the revised standard included several modifications to the original standard designed to make the standard more suitable to the non-manufacturing sectors. *Id.* at 31,860.<sup>7</sup> Shortly thereafter, OMB held a public hearing, pursuant to the PRA, to solicit comments on the recordkeeping, notification, and other paperwork requirements of the revised standard. See 52 Fed. Reg. 36,652 (1987). On October 23, OMB notified the Department of Labor that it disapproved three particular provisions that the Secretary had added to the standard. App., *infra*, 22a-44a. It specifically disapproved: (1) "the requirement that [MSDSs] be provided on multi-employer worksites" either through the exchange

<sup>7</sup> Broadly speaking, the standard requires chemical manufacturers and importers to develop hazard information, label their chemical containers, and send material safety data sheets (MSDSs) to downstream manufacturing and non-manufacturing customers (29 C.F.R. 1900.1200(d), (f), (g)). Furthermore, the standard requires manufacturing and non-manufacturing employers: (1) to prepare a written hazard communication program that describes the employer's general compliance plan and contains a list of the hazardous chemicals used in the workplace; (2) to ensure that labels remain affixed on the containers and that when hazardous chemicals are transferred to new containers, those containers are also labelled properly; and (3) to maintain the MSDSs and make them readily accessible to employees in their work areas (29 C.F.R. 1910.1200(e), (f), (g)). In addition, employers must provide information and training to their employees with respect to the requirements of the standard and the chemical hazards present in the workplace (29 C.F.R. 1910.1200(h)).

of MSDSs among employers or their maintenance at a central location at the worksite; (2) "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" (*i.e.*, "any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product" (App., *infra*, 36a)); and (3) "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. App., *infra*, 25a, 43a. See 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), and (e)(2)(i) (1987).

OMB's disapproval of the first requirement was based on its determination that the options provided for either mandatory exchange of potentially huge numbers of MSDSs at the worksite or depositing this information at a central location on the worksite (as opposed to a requirement that they be made available upon request) would impose substantial paperwork requirements but would have little, if any, practical utility. See App., *infra*, 30a-33a. As for the other disapprovals, OMB concluded, among other matters, that the disclosures mandated by those provisions would be inconsistent with related EPA requirements (for consumer products) and would substantially duplicate disclosures already required by the FDA (for drugs). See *id.* at 33a-38a. OMB instructed the Secretary "to revise these requirements \* \* \* or collect new information that would warrant a reconsideration of our decision" (*id.* at 26a).<sup>8</sup>

<sup>8</sup> On January 14, 1988, the Department of Labor notified OMB that it would initiate a new rulemaking, but further explained that it would not be possible to complete the rulemaking by March 1, 1988, the date specified by OMB. App., *infra*, 45a-48a. In early March, the Department of Labor requested that OMB renew its 1983 approval of the hazard communication standard's paperwork requirements. On April 13, 1988, OMB approved all of the hazard communication

The organizations representing employee interests in *USWA I* and *USWA II* returned once again to the court of appeals and requested that court to hold the Secretary and the Director of OMB (who was not a party to the previous litigation) in contempt. They argued that the Secretary violated the earlier orders when she acceded to OMB's review and disapproval of portions of the standard and, more fundamentally, that OMB lacked authority under the PRA to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while declining to hold the Secretary or the Director in contempt, agreed with the attack on OMB's authority and invalidated the disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America v. Pendergrass (USWA III)*, App., *infra*, 1a-13a. The court recognized that the PRA authorizes OMB to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c)(2)). See App., *infra*, 7a. It held, however, that the pertinent provisions of the hazard communication standard "are insulated from OMB authority" (*id.* at 8a) because they do not "require the 'collection of information'" (*ibid.*) and they "embod[y] substantive policy decision making entrusted to [the Secretary of Labor]" (*ibid.*).

The court of appeals first reasoned that the two provisions dealing with consumer products and drugs are "exemptions from the labeling requirements of the hazard communication standard" (App., *infra*, 9a (emphasis in

standard's paperwork requirements except the three previously disapproved provisions. *Id.* at 49a-58a. The Department of Labor subsequently solicited public comment and has held hearings on what modifications (if any) should be made in light of OMB's disapproval. See 53 Fed. Reg. 29,822 (1988).

original)) and that "[w]hatever else the terms 'collection of information' or 'information collection requests' may refer to, they cannot possibly refer to these exemptions from labeling requirements" (*ibid.*). The court then concluded that the disapproved provision dealing with information exchange at multi-employer worksites does not involve a "collection of information" because it "requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*). The court stated that "[t]he exchange requirement no more constitutes the collection of information within the meaning of the [PRA] than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers" (*id.* at 11a). The court added that its conclusion was "reinforced" by other language in the PRA that "disaffirms the intention to grant substantive lawmaking authority to OMB" (*ibid.*).

Having addressed the merits, the court of appeals then turned to the question whether the employee groups were entitled to challenge OMB's disapproval through a contempt motion directed at the Secretary of Labor, rather than bringing an action for review of OMB's action pursuant to the Administrative Procedure Act. The court reasoned that the Secretary's withdrawal of the disapproved provisions was inconsistent with the court's prior orders and that relief by motion was therefore appropriate. App., *infra*, 12a-13a.

#### REASONS FOR GRANTING THE PETITION

The Secretary of Labor proceeded in strict conformity with the PRA, OMB's regulations, and established government practices by submitting the hazard communication standard for OMB paperwork review and by notifying the regulated parties that the three disapproved provisions would not go into effect. The court of appeals nevertheless

held that the Secretary's action was improper. The court's decision, which failed even to acknowledge OMB's controlling regulations, is extraordinary. Applied only to the specific agency action at issue here, it would have substantial consequences: it would eliminate OMB paperwork review of one of the most significant paperwork requirements in regulatory history. But still more troubling, the court's decision, if left standing, would effectively invalidate OMB's authority to review a wide range of other essentially indistinguishable agency information collection and dissemination activities. The court of appeals' decision is erroneous and is at odds with the reasoning of another court of appeals' decision addressing OMB's responsibilities under the PRA's predecessor statute—the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.* (1976). Review by this Court is accordingly warranted.

1. OMB estimates that Americans spent nearly 2 billion hours in 1988 to meet federal information collection requirements. About one-eighth of that time, or 250 million hours, involved the collection and communication of information from one private party to another through federally mandated reporting or recordkeeping requirements.<sup>9</sup> OMB has consistently conducted a PRA review of such disclosure requirements to ensure that they are "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). As we have explained, OMB

<sup>9</sup> OMB regulations require an agency to include a determination of the number of hours of paperwork required by an information collection request when the agency proposal is submitted for OMB review. See 5 C.F.R. 1320.11(a). See also *Request for OMB Review*, Standard Form 83, Box 17. The 2 billion hour estimate is from the Information Collection Budget, which compiles figures for each proposal. The 250 million hour estimate is based on OMB's review of requests that involve disclosure requirements. The numbers of hours of paperwork cited below for specific regulatory initiatives are agency estimates submitted with the agencies' various proposals.

conducted a PRA review of the Secretary of Labor's original hazard communication standard (48 Fed. Reg. 53,280 (1983)), which imposed about 652,000 hours of paperwork. The Secretary of Labor estimates that the revised hazard communication standard, applicable to both the manufacturing and non-manufacturing sectors, would require about 54 million hours of paperwork in the first year alone. OMB has also reviewed, or is in the process of reviewing, numerous other substantially identical disclosure requirements. The more prominent examples include:

- (a) Environmental Protection Agency (EPA) community right-to-know disclosures, which require compilation of information on chemical plant inventories and layout and transmittal of chemical information from plants to state and local governments. See 52 Fed. Reg. 38,344 (1987) (38.5 million hours);
- (b) Federal Trade Commission (FTC) textile fiber products identification disclosures and fair packaging and labeling disclosures, which require labeling of basic information concerning the composition and contents of various merchandise. See 53 Fed. Reg. 5986 (1988); 53 Fed. Reg. 13,159 (1988) (29 million hours);
- (c) Food and Drug Administration (FDA) nutrition labels, which require food manufacturers to label their products with ingredient information. See 52 Fed. Reg. 28,607 (1987) (4.8 million hours).

OMB has also reviewed, or is in the process of reviewing, federally mandated disclosures that require compilation and communication of information on pension benefits, subsidized housing inspections, hearing aids, lead-based paint, medical exams, medicated animal feeds, blasting at mines, airline on-time records, used car odometer totals, and funeral services, to mention a few.

The court of appeals' decision in this case expressly prohibits OMB from evaluating the operative provisions of the Secretary of Labor's hazard communication standard. That result, by itself, would substantially undermine Congress's goal of "minimizing the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons" (44 U.S.C. 3501(1)). But the court of appeals' decision would likely have the even more drastic result of preventing OMB review of other substantially identical disclosure requirements such as those listed above. The court of appeals held that the hazard communication standard was not subject to OMB review because federally mandated disclosure through on-site recordkeeping or labeling did not involve the collection of information. See App., *infra*, 8a-11a. That reasoning would also apply to each of those other disclosure provisions. Each requires, in whole or in part, that private parties disclose information to other private parties through reporting, recordkeeping, or labeling.

The threat to the efficacy of the PRA is both real and pressing because those disclosure requirements are generally imposed through the promulgation of regulations that have nationwide effect and because OMB re-evaluates the paperwork burdens of those requirements, which typically affect significant portions of the American population, not less than every three years. See 5 C.F.R. 1320.13(i). The court's decision, if left uncorrected, would seriously disrupt OMB's established practice of conducting a PRA review of these types of disclosures in numerous regulatory spheres.

2. The court of appeals' decision not only would have far-reaching consequences, it is also incorrect. The Secretary of Labor and OMB agree that the hazard communication standard is subject to PRA review. OMB, the expert

agency charged with administering the PRA, has reasonably interpreted the statute as requiring review of these types of agency disclosure requirements. That review provides a centralized and objective assessment within the Executive Branch to assure that one agency's requirements do not duplicate the requirements of another and that the disclosure itself is necessary and will have practical utility. The court of appeals clearly erred in prohibiting PRA review.

We observe at the outset that the sole basis for the court of appeals' exercise of jurisdiction in this case was to determine whether the Secretary of Labor had complied with the court's previous order requiring the Secretary to extend a hazard communication standard to the non-manufacturing sector. The specific issue before the court was whether the Secretary had disobeyed the court's prior order by submitting the revised hazard communication standard to OMB for PRA review and then withdrawing the disapproved provisions. See App., *infra*, 12a-13a. We submit that nothing in the court of appeals' prior order foreclosed PRA revision of the expanded hazard communication standard, and accordingly there was no basis for respondents' contempt action.<sup>10</sup> The court rejected that reasoning and concluded that the Secretary acted inconsistently with the court's order because the PRA does not permit OMB

<sup>10</sup> Notably, the court's prior order did not expressly prohibit the Secretary from resubmitting the hazard communication standard for PRA review. See *USWA II*, 819 F.2d at 1270. The court's order, set forth at page 12, *supra*, makes no mention of the matter. Furthermore, the court presumably recognized that the previous hazard communication standard, applicable to the manufacturing sector, had received PRA review. See page 11, *supra*. It therefore should have come as no surprise to that court or any of the parties that the revised standard would receive PRA review as well. Thus, the court's order cannot

to review the hazard communication standard. However, both the court's method of analysis and its ultimate conclusion on this point are fundamentally flawed.

This Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), indicates that the question whether OMB has properly interpreted the PRA requires two subsidiary inquiries:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-843 (footnotes omitted). The court of appeals here did not inquire "whether Congress has directly spoken to the precise question at issue" or "whether the agency's answer is based on a permissible construction of the statute"; it "simply impose[d] its own construction on the statute" based on an exceedingly narrow view of the purpose of the PRA. See App., *infra*, 7a, 10a. If the court had conducted the *Chevron* inquiry, it would have reached a different result.

reasonably be construed as prohibiting the Secretary's action, and a challenge to the Secretary's action through a contempt proceeding is inappropriate.

The "precise question at issue" here is whether an agency requirement that employers communicate safety information to employees through the compilation and use of standard information forms (MSDSs), labeling, and written compliance plans, is an "information collection request" within the meaning of the PRA. The PRA statutory provisions that speak most directly to this question—the definitional provisions—indicate that it is. The PRA defines the term "information collection request" as a "written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986) (emphasis added)). The PRA further defines the "collection of information" to include "the obtaining or soliciting of facts or opinions by an agency through the use of \* \* \* reporting or recordkeeping requirements or other similar methods" (44 U.S.C. 3502(4) (emphasis added)). As OMB's regulations explain, the "soliciting of facts or opinions" can include an agency demand that persons "obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). A reporting requirement can include an agency requirement that a person "provide information to another person" (5 C.F.R. 1320.7(s)), and a recordkeeping requirement can include a requirement "that information be maintained or retained by persons but not necessarily provided to the agency" (5 C.F.R. 1320.7(r)). Thus, an agency requirement that an employer communicate hazard information through compilation and maintenance of MSDSs, labeling, and written training programs can reasonably be viewed as the "soliciting of facts or opinions" through "reporting or recordkeeping requirements or other similar methods."<sup>11</sup>

<sup>11</sup> The hazard communication standard requires chemical manufacturers to develop MSDSs and to transmit them to downstream em-

The PRA's definition of the terms "information collection request" and "collection of information" may not, by itself, compel OMB's conclusion that the hazard communication standard is subject to PRA review, but it strongly supports and certainly allows that conclusion. Where, as here, "the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K mart Corp. v. Cartier, Inc.*, No. 86-495 (May 31, 1988) slip op. 8. OMB's regulatory interpretation is also manifestly consistent with the PRA's objectives. The PRA's stated purpose is to minimize the public's paperwork burdens while maximizing the usefulness of information collected, maintained, or disseminated pursuant to federal requirements. 44 U.S.C. 3501.<sup>12</sup> These objectives

employers. The provision requiring that employers exchange or centrally maintain MSDSs at multi-employer worksites obviously is, in its own right, a recordkeeping requirement since it requires employers to gather and keep records at a specific site. The court's conclusion (App., *infra*, 9a) that this provision "requires employers, not to compile, but simply to transmit information" is facially incorrect. The court's conclusion (*ibid.*) that the PRA does not apply to the other two disapproved provisions because they are "exemptions from labeling requirements" is treble mistaken. First, OMB did not simply disapprove the Secretary's exemptions; it determined that the scope of the hazard communication standard's coverage, even with those exemptions, was too broad. In any event, OMB is entitled to determine whether exemptions from paperwork burdens are sufficiently broad to ensure that the information that is collected is "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). Second, the provisions here do not involve simply "labeling" requirements; they specify whether certain consumer products and drugs are subject to the hazard communication standard's other information collection requirements as well. And third, labeling requirements in any case generally are reporting requirements subject to OMB review. See 5 C.F.R. 1320.7(c).

<sup>12</sup> The court of appeals erred in stating that the PRA is simply "aimed at reducing the burden of paperwork required by the federal

are equally relevant and important whether a federal agency requires persons to collect information and transmit it to the agency for subsequent dissemination, or whether the agency requires those persons to collect information and disseminate it to third persons. Cf. *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, 1453 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. OMB's regulations recognize this fact.<sup>13</sup>

The court of appeals' conclusion that the PRA does not give OMB "authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (App., *infra*, 10a) apparently resulted from the court's exclusive focus on Sections 3504(a) and 3518(e).<sup>14</sup> These provisions, however, must be read in harmony with Sections 3508 and 3518(a). Section 3508 specifically states that "the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the

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government for its own regulatory or statistical purposes" (App., *infra*, 10a).

<sup>13</sup> See, e.g., 5 C.F.R. 1320.7(c)(2) ("Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency.").

<sup>14</sup> These provisions of the PRA state that the Director shall exercise his authority "consistent with applicable law" (44 U.S.C. 3504(a)) and that the statute shall not be interpreted "as increasing or decreasing the authority of the President, [OMB], or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices" (44 U.S.C. 3518(e)). See App., *infra*, 11a. These provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has a responsibility to review whether the agency has chosen effective information collection methods to *achieve* those objectives.

information will have practical utility" for the agency. 44 U.S.C. 3508. See also 44 U.S.C. 3504(c). In addition, Section 3518 states that "[e]xcept as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities *is subject to* the authority conferred on the Director by this chapter." 44 U.S.C. 3518 (emphasis added). Thus, the PRA is quite explicit in allowing OMB to review the kinds of disclosure an agency needs to accomplish its substantive policies.<sup>15</sup>

The legislative history also supports OMB's exercise of its PRA review authority. The House Committee Report indicates that the PRA was intended to cover the types of disclosures involved here and that OMB is entitled to review an agency's method of accomplishing its substantive policies:

[The Securities and Exchange Commission (SEC)] [s]trongly recommended that [the House bill] be amended to narrow the definition of "collection of information" to exclude reporting required in connection with statutorily-authorized regulatory, enforcement, or oversight efforts. SEC believes that the current Federal Reports Act definition is limited to collection for statistical purposes and does not authorize

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<sup>15</sup> This case illustrates how the PRA was meant to work. The Secretary of Labor determined that the Department's regulations should assure that employees at multi-employer work-sites have access to hazard information concerning all of the hazards at the site. OMB's review was directed to whether the Secretary's method of providing that information—on-site exchange or centralized retention of MSDSs—would have practical utility. OMB disapproved the Secretary's method, but it suggested an alternative method to achieve the regulatory goal and it permitted the Secretary the opportunity for additional rulemaking to provide further information on why her method was necessary. Thus, OMB did not usurp the Secretary's substantive policymaking function.

review of disclosure- or enforcement-related information gathering.

The Committee agrees with \* \* \* SEC as to the close relationship between policy making and information management. However, regulatory agencies in the executive branch, such as EPA, have been able to justify to OMB their need for information used to establish policy or for other purposes. The independent regulatory agencies should also be capable of doing so. \* \* \*. The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements.

H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). The subsequent Senate Report made the same point:

Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

S. Rep. No. 930, 96th Cong., 2d Sess. 39-40 (1980).<sup>16</sup>

In sum, OMB's conclusion that the disclosure involved here is subject to PRA review, if not clearly required by the PRA, is at the very least "based on a permissible construction of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843. The court of appeals clearly erred in substituting its own construction of the statute.

3. The court of appeals' decision in this case rests on a view of the PRA that is at odds with *Action Alliance of Senior Citizens v. Bowen*, *supra*. In that case, the District of Columbia Circuit held that the PRA's statutory predecessor, the Federal Reports Act, authorized OMB to review an agency regulation requiring federal funds recipients to conduct a "self-evaluation" to determine whether they were in compliance with the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* The court characterized as "pure pettifoggery" (846 F.2d at 1453) the claim that the Federal Reports Act applies only when the agency requires that information must be submitted to the government. It added (*id.* at 1453-1454):

OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information." Regulation A, Federal Reporting Serv-

<sup>16</sup> Congress has amended and reenacted the PRA since OMB's 1983 promulgation of the regulations involved here. See Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341 (1986). Congress gave no indication that it disagreed with OMB's interpretation. Congress's failure to criticize or overrule the agency's regulations provides an additional basis for inferring that OMB has correctly gauged Congress's intent. See, e.g., *United States v. Rutherford*, 442 U.S. 544, 554 (1979).

ices, Clearance of Plans and Reports Forms, Title I(1)(e) (February 13, 1943) \* \* \*. Even under the deference we owe the agency [citing *Chevron*], we doubt that we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collection of information." Happily we confront no such oddity.

The court also rejected the argument that OMB's review encroached on the " 'substantive policies and programs' " of other agencies (846 F.2d at 1454, quoting 44 U.S.C. 3518(e)).

The Third Circuit attempted to distinguish *Action Alliance* on the ground that it involved "compilation but not transmission of information" (App., *infra*, 9a). In the court's view, the "multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*). But as we have explained (note 11, *supra*), the MSDS exchange provision plainly requires the employer to "compile" information at a particular location. Thus, the Third Circuit and the D.C. Circuit, faced with similar facts, applied divergent reasoning and reached inconsistent results. Since the court of appeals' decision in the present case interpreted the PRA, while the D.C. Circuit's decision in *Action Alliance* interpreted the Federal Reports Act, the two decisions are not in square conflict. But even that distinction is largely technical since the PRA was intended to clarify the broad coverage of the Federal Reports Act. See pages 25-26, *supra*. In any event, the fact that parties may generally challenge OMB review of any nationwide rule in the federal circuit of their choice—and may therefore direct future cases to the Third Circuit—counsels against this Court's awaiting further developments in the courts of appeals before addressing the important question presented in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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FEBRUARY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS  
THIRD CIRCUIT

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Nos. 83-3554, 83-3561, 83-3565, 84-3066,  
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,  
PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

AND

THE STATE OF NEW YORK, THE STATE OF NEW JERSEY,  
THE STATE OF CONNECTICUT AND NATIONAL PAINT &  
COATINGS ASSOCIATION, INTERVENORS

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,  
PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

AND

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS  
ASSOCIATION, AMERICAN PETROLEUM INSTITUTE &  
ATLANTIC RICHFIELD COMPANY, AND NATIONAL PAINT &  
COATINGS ASSOCIATION, INTERVENORS

PUBLIC CITIZEN, INC., ET AL., PETITIONERS

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

AND

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS  
ASSOCIATION, NATIONAL PAINT & COATINGS ASSOCIATION,  
AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD  
COMPANY, INTERVENORS

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW  
COMMISSION, SECRETARY OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR, RESPONDENT

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, AND RAYMOND  
DONOVAN, SECRETARY OF UNITED STATES DEPARTMENT OF  
LABOR, RESPONDENTS

THE STATE OF NEW YORK, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

Submitted Under Third Circuit Rule 12(6)

Aug. 5, 1988

Decided Aug. 19, 1988

# OPINION OF THE COURT

Before GIBBONS, Chief Judge, and FISHER,\* and  
KELLY,\*\* District Judges.

GIBBONS, Chief Judge.

## I

Once again United Steelworkers of America and Public Citizen, Inc. *et al.*, (petitioners) come before this court on a motion seeking further relief in the enforcement of our judgment in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985) (USWA I), issued on July 8, 1985. In USWA I we directed the Secretary of Labor to reconsider the application of the hazard communication standard promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982), to employees in sectors of the economy other than manufacturing. 763 F.2d at 743. The Secretary took the position that this judgment permitted the commencement of an entirely new rulemaking proceeding. The petitioners, contending that the Secretary was not in good faith complying with our judgment,

\* Hon. Clarkson S. Fisher, United States District Court Judge for the District of New Jersey, sitting by designation.

\*\* Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

moved for further relief. In *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir.1987) (USWA II) we held that by commencing a new rulemaking proceeding the Secretary was not complying with our previous judgment. We directed that the Secretary should,

within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered by the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such statement of reasons will be supplied separately as to each category of excluded workers.

819 F.2d at 1270. (Footnote omitted). On August 7, 1987 this court denied the Secretary's petition for rehearing and motion for a stay.

On August 24, 1987 the Occupational Safety and Health Administration (OSHA or the Secretary) published an expanded hazard communication standard applicable to all industries. 52 Fed.Reg. 31852, *et seq.* (codified at 29 C.F.R. § 1910.1200). This August 24, 1987 promulgation includes an OSHA finding that the rulemaking record on the whole supported a determination that the hazard communication standard is feasible in all industries. 52 Fed.Reg. at 31857. It applies the hazard communication standard to employers in all economic sectors, including the labeling requirements, as well as the requirement that covered employers make available for employee inspection Material Safety Data Sheets (MSDS) furnished by the manufacturers of hazardous chemicals used in the workplace, and the requirement that employees be provided with information and training on hazardous chemicals used in

their work area. The August 24, 1987 promulgation also includes three provisions not contained in the original hazard communication standard applicable in the manufacturing sector alone. These are: (1) a requirement that at multi-employer work-sites employers exchange their MSDSs, either individually or through a central location, 29 C.F.R. § 1910.1200(e)(2); (2) an exemption from the labeling requirement for consumer products used in the same manner and quantities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200(b)(6)(viii). OSHA explained that these modifications were made "to ensure that [the] provisions [of the standard] are practical and effective in communicating hazards to all workers" and in recognition of "the unique characteristics of some businesses [that] render certain provisions of the [previous] standard unnecessary or ineffective in communicating the hazards of chemicals to workers." 52 Fed.Reg. at 31858.

This revised hazard communication standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub.L. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 *et seq.* (Supp.1988). On September 30, 1987 OMB undertook public notice and comment "on the recordkeeping, notification and other paperwork requirements" of the revised standard. 52 Fed.Reg. 36652. Following a public hearing, OMB purported to disapprove the three new provisions referred to in the preceding paragraph. OMB also conditioned its approval of the entire standard on the

undertaking by OSHA of further rulemaking to consider OMB's objections. OMB letter of October 23, 1987. Further negotiations between OSHA and OMB followed, and on April 13, 1988 OMB announced that it would permit the revised standard, but without the "disapproved" portions, to go into effect on May 23, 1988 as scheduled.

Meanwhile, two court proceedings regarding the revised standard were initiated. First, Associated Builders & Contractors, Inc. petitioned to review the revised hazard communication standard in the United States Court of Appeals for the District of Columbia, and moved for a stay of its enforcement in the construction industry. *Associated Builders & Contractors, Inc. v. McLaughlin*, (D.C.Cir. No. 87-1582). That court, on motion of the petitioners, transferred the Associated Builders & Contractors, Inc. petition to this court, but granted an administrative stay "until such time as the third circuit rules on the emergency motion for stay." Order of May 20, 1988. This panel has by a separate order denied that emergency motion.

Second, on April 6, 1988 the petitioners moved in this court for further relief. The effect of the April 13 OMB change of position, allowing the bulk of the hazard communication standard to go into effect, is that the petitioners' charge of non-compliance is now narrowed to the three provisions which OSHA has in effect withdrawn, in compliance with the OMB disapproval.

Both Associated General Contractors of America, and United Technologies Corporation moved in this court to intervene for the purpose of opposing the petitioners' motion for further relief.

## II

In this matter of first impression we are called upon to consider the extent to which the Paperwork Reduction Act of 1980 authorizes the OMB to substitute its judgment for

that of OSHA with respect to the appropriate communication of hazards in the workplace necessary for compliance with section 6 of the OSH Act. Housed in Chapter 35 of Title 44 of the United States Code, which deals generally with "Public Printing and Documents," the Paperwork Reduction Act is the successor to the Federal Reports Act of 1942, previously codified in that Chapter. To generalize, the purpose of the Federal Reports Act was to coordinate the information collection activities of federal agencies, thereby reducing the cost of those activities to the government and to business and individuals required to file reports. The Paperwork Reduction Act of 1980 moved that function from the Director of the Bureau of the Budget to a new Office of Information and Regulatory Affairs in the Office of Management and Budget.

The Paperwork Reduction Act authorizes OMB to:

- (1) review[] and approv[e] information collection requests proposed by agencies;
- (2) determin[e] whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

....

44 U.S.C. § 3504(c)(1) and (2). The "information collection requests" referred to in section 3504(c)(1) are defined in section 3502(11) as "written report form[s], application form[s], schedule[s], questionnaire[s], reporting or record-keeping requirement[s], collection of information requirement[s], or similar method[s] calling for the collection of information." This "collection of information" referred to in section 3504(c)(2) is defined in section 3502(4) as:

the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting

or recordkeeping requirements, or other similar methods calling for either —

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

....

44 U.S.C. § 3502(4)(A) and (B). Assuming that the information in issue falls within the Paperwork Reduction Act of 1980, OMB's regulatory authority over it is specifically limited by two provisions of that Act. First, OMB's authority "shall be exercised consistent with applicable law." 44 U.S.C. § 3504(a). Second, the Act provides:

Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any federal agency to enforce the civil rights laws.

44 U.S.C. § 3518(e). Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either, (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

As we noted above, OMB disapproved of three provisions of the revised hazard communication standard, each

of which was a departure from the standard which OSHA first imposed on employers in the manufacturing sector. Two of those departures are *exemptions* from the labeling requirements of the hazard communication standard. Thus, the revised standard exempts from its coverage (1) consumer products subject to labeling requirements under the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, and the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, and (2) drugs subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, 29 C.F.R. § 1910.1200(b)(6)(vii) and (viii).

Whatever else the terms "collection of information" or "information collection requests" may refer to, they cannot possibly refer to these exemptions from labeling requirements which would otherwise have been duplicative of the labeling requirements imposed in the interest of health and safety by other federal regulatory agencies. What is left for consideration is the requirement that employers on multi-employer worksites exchange MSDSs, imposed for the first time in the August 24, 1987 promulgation. 29 C.F.R. § 1910.1200(e)(2). We note initially that we are not presented with the question whether the Paperwork Reduction Act of 1980 applies when the federal government requires from non-governmental parties, for its own purposes, compilation but not transmission of information. See *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449 (D.C.Cir.1988). The multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees. The sole question it presents is whether that requirement can be said to involve either the "collection of information" or an "information collection request" within the meaning of the Paperwork Reduction Act.

In *USWA I* we discussed in detail the development by OSHA of the hazard communication standard. We noted that it imposed on chemical manufacturers the obligation to label containers and to furnish to downstream users MSDSs containing chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 763 F.2d at 732. Although the issue was not raised in *USWA I*, implicit in OSHA's standard, and in this court's approval of it, is the holding that imposing this obligation on chemical manufacturers is an appropriate safeguard for workers in the workplace, as required by section 6 of the OSH Act. The same must be said for the obligation imposed on downstream employers to make MSDSs available to their employees. *Id.* at 733. In one sense the standard requires chemical manufacturers to collect and transmit information, and employers to collect and maintain information. It would be a far-fetched interpretation of the Paperwork Reduction Act of 1980, however, to hold that these activities fell within its coverage. The Act, historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government for its own regulatory or statistical purposes. The preparation and preservation of MSDSs in the workplace have entirely different purposes. The object of these information disclosure requirements, in accordance with the OSH Act, is to increase workplace awareness of hazards, thereby enabling workers to avoid injury, illness or death. Nothing in the Paperwork Reduction Act suggests a congressional intention to allow OMB, in the guise of regulating collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies.

OMB did not go so far as to disapprove the requirement that chemical manufacturers prepare and transmit MSDSs or the requirement that employers who purchase the chemicals make them available to their employees. It merely disapproved the requirement that on multi-employer work-sites the employers exchange the MSDSs. In *USWA I* we questioned the basis of the Secretary's failure to include the construction industry in the hazard communication standard. 763 F.2d at 738. That industry is now included, and the problem of multi-employer worksites is endemic to it. OSHA reasonably concluded that the protection of one trade from hazardous substances used by another on the same job-site required the exchange of the hazard information. The exchange requirement no more constitutes the collection of information within the meaning of the Paperwork Reduction Act of 1980 than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers.

Our conclusion that the regulations disapproved by OMB do not involve the collection of information is reinforced by the statutory language which in two places disaffirms the intention to grant substantive lawmaking authority to OMB. 44 U.S.C. §§ 3504(a); 3518(e). Clearly, OMB cannot in the guise of reducing paperwork substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling, drug package inserts, proxy statement disclosures, or the contents of registration statements. No substantive distinction between such disclosure requirements and the OSHA disclosure requirements disapproved by OMB in this instance is readily apparent.

## III

OSHA and United Technologies, as intervenor, contend that we should nevertheless deny the petitioners' motion for additional relief. They contend that the petition should be construed as a challenge to OMB agency action under the Paperwork Reduction Act of 1980, cognizable only in a suit in a federal district court pursuant to the Administrative Procedure Act. 5 U.S.C. § 703. Alternatively they contend that because the three provisions which OMB disapproved were added to the hazard communication standard they do not involve our prior mandate, and can only be reviewed in a new challenge to OSHA rulemaking. We reject both contentions.

In *USWA I* we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In *USWA II* we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, 846 F.2d at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). With-

drawal of the provisions disapproved by OMB was accordingly inconsistent with those orders. Relief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977); *USWA II*, 819 F.2d at 1270.

## IV

This panel has denied the motion by Associated Builders & Contractors, Inc. for a stay of the hazard communication standard. That motion was made in connection with a petition for review filed in the Court of Appeals for the District of Columbia, and transferred here. This petition appears to be an attempt to relitigate issues settled in our decisions in *USWA I* and *USWA II*. Since, however, briefing on that petition has not been completed we will not rule finally on it at this time. The clerk will be directed to issue a briefing schedule, and, when briefing is complete, to assign the petition to a panel for disposition.

## V

The Secretary shall forthwith publish in the Federal Register a notice that those parts of the August 24, 1987 hazard communication standard which were disapproved by OMB are now effective. Because the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority, we will deny at this time the petitioners' motion to hold the respondent officials of the Department of Labor in contempt.

14a

**APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT—**

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**No. 83-3554**

**UNITED STEELWORKERS OF AMERICA,  
AFL-CIO-CLC, PETITIONER**

**v.**

**JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT**

**AND**

**THE STATE OF NEW YORK, THE STATE OF NEW JERSEY,  
THE STATE OF CONNECTICUT AND NATIONAL PAINT &  
COATINGS ASSOCIATION, INTERVENORS**

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**No. 83-3561**

**UNITED STEELWORKERS OF AMERICA,  
AFL-CIO-CLC, PETITIONER**

**v.**

**JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT**

**AND**

**THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS  
ASSOCIATION, AMERICAN PETROLEUM INSTITUTE &  
ATLANTIC RICHFIELD COMPANY, AND NATIONAL PAINT  
& COATINGS ASSOCIATION, INTERVENORS**

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15a

**No. 83-3565**

**PUBLIC CITIZEN, INC., ET AL., PETITIONERS**

**v.**

**JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT**

**AND**

**THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS  
ASSOCIATION, NATIONAL PAINT & COATINGS ASSOCIATION,  
AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD  
COMPANY, INTERVENORS**

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**No. 84-3066**

**COMMONWEALTH OF MASSACHUSETTS, PETITIONER**

**v.**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,  
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF  
LABOR, RESPONDENT**

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**No. 84-3093**

**PEOPLE OF THE STATE OF ILLINOIS, PETITIONER**

**v.**

**UNITED STATES DEPARTMENT OF LABOR AND  
RAYMOND DONOVAN, SECRETARY OF UNITED STATES  
DEPARTMENT OF LABOR, RESPONDENTS**

No. 84-3128

THE STATE OF NEW YORK, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

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**ON PETITION FOR REVIEW FOR FURTHER RELIEF WITH  
RESPECT TO PRIOR DECISIONS OF THIS COURT**

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Present: GIBBONS, Chief Judge, and FISHER\*, and  
KELLY\*\*, District Judges

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[Filed Aug. 19, 1988]

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**ORDER**

These causes came to be heard on the record from the Occupational Safety and Health Administration of the United States Department of Labor, and were submitted under Third Circuit Rule 12(6) August 5, 1988, in regard to the motion seeking further relief in the enforcement of this Court's Judgment in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985).

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\* Hon. Clarkson S. Fisher, United States District Court Judge for the District of New Jersey, sitting by designation.

\*\* Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the Secretary shall forthwith publish in the Federal Register a notice that those parts of the August 24, 1987, hazard communication standard which were disapproved by the Office of Management and Budget (OMB) are now effective. It is further ordered and adjudged that the petitioners' motion to hold the respondent officials of the Department of Labor in contempt is denied since the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS  
Clerk

August 19, 1988

Certified as a true copy and issued in lieu of a formal mandate on January 30, 1989.

Test: /s/ M. ELIZABETH FERGUSON  
Chief Deputy Clerk, U.S. Court of Appeals  
for the Third Circuit

**APPENDIX C****UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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Nos. 83-3554, 83-3562 & 83-3565  
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY  
OF LABOR, ETC., RESPONDENT

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PUBLIC CITIZEN, INC., ET AL., PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY  
OF LABOR, ETC., RESPONDENT

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**SUR PETITION FOR REHEARING**

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[Filed Nov. 28, 1988]

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Present: GIBBONS, Chief Judge, STAPLETON, MANSMANN,  
GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit  
Judges, FISHER and KELLY, District Judges\*

The petition for rehearing filed by the respondent in the  
above entitled case having been submitted to the judges  
who participated in the decision of this court and to all

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\* As to panel rehearing only.

the other available circuit judges of the circuit in regular  
active service, and no judge who concurred in the decision  
having asked for rehearing, and a majority of the circuit  
judges of the circuit in regular active service not having  
voted for rehearing by the court in banc, the petition for  
rehearing is denied.

/s/ JOHN J. GIBBONS  
Chief Judge

Dated: November 28, 1988

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 83-3554, 83-3562 & 83-3565  
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY  
OF LABOR, ETC., RESPONDENT

---

PUBLIC CITIZEN, INC., ET AL., PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY  
OF LABOR, ETC., RESPONDENT

---

SUR PETITION FOR REHEARING

---

[Filed Nov. 28, 1988]

---

Present: GIBBONS, Chief Judge, STAPLETON, MANSMANN,  
GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit  
Judges, FISHER and KELLY, District Judges\*

The petition for rehearing filed by the intervenor,  
United Technologies Corporation, in the above entitled  
case having been submitted to the judges who participated

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\* As to panel rehearing only.

in the decision of this court and to all the other available  
circuit judges of the circuit in regular active service, and  
no judge who concurred in the decision having asked for  
rehearing, and a majority of the circuit judges of the cir-  
cuit in regular active service not having voted for rehearing  
by the court in banc, the petition for rehearing is denied.

/s/ JOHN J. GIBBONS

Chief Judge

Dated: November 28, 1988

## APPENDIX E

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

[Seal]

Oct. 28, 1987

Honorable Thomas C. Komarek  
Assistant Secretary for  
Administration and Management  
Department of Labor  
Washington, D.C. 20210

Dear Tom:

Pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35), we have completed our review of the collection of information requirements in the Occupational Safety and Health Administration's Hazard Communication Standard (HCS), which were submitted to us by your office on September 10, 1987. We notified the Department of our decision on October 23, 1987. This letter explains in greater detail our October 23rd decision and transmits the record of our October 16, 1987 public hearing on the HCS together with the written comments we have received.

As proposed by OSHA on March 19, 1982, and promulgated as a final rule on November 25, 1983, the HCS applied only to the manufacturing sector of the economy. Pursuant to a court order, OSHA promulgated on August 24, 1987 a new final HCS based on the record developed in response to the original proposal. This most recent final

rule differs substantially from the original proposal because it applies to the non-manufacturing sector as well.

On September 10, 1987, you submitted for the first time the paperwork provisions in the revised final rule for OMB review. Thus, you asked us to reinstate previously approved paperwork covering the manufacturing sector, for which OMB approval expired on June 30, 1987, and to approve an additional 28.7 million hours of new paperwork covering the non-manufacturing sector. In addition, we are asked to approve new paperwork for the manufacturing sector that apparently went into effect 30 days after publication of the new final rule, without approval under the Paperwork Reduction Act.

Our review of the paperwork provisions in the expanded standard has confirmed our support and earlier approval of the original Hazard Communication Standard in 1983, and our belief in its importance in reducing occupational illnesses and injuries by ensuring that workers are informed about the hazards of substances to which they may be exposed on the job. As OSHA has long recognized, however, this deceptively simple goal becomes exceedingly complicated when applied to millions of different work-sites, work conditions, and products across the country. I commend the Department for continuing to adopt a performance-oriented approach to hazard communication that allows employers flexibility in complying with the rule, and for tailoring the expanded rule to adapt the flow of information more appropriately to some of these work-sites and products.

## Decision

Your request for OMB review of the HCS paperwork provisions has raised difficult issues. The Department promulgated a final rule under an order from the U.S. Court of Appeals for the Third Circuit, but failed to follow the approval procedures required in Section 3504(h) of the Paperwork Reduction Act. The explicit purpose of Section 3504(h) is to establish a mechanism to coordinate rulemakings and Paperwork Reduction Act reviews. Section 3504(h) allows OMB to disapprove any collection of information requirement where the agency has substantially modified in the final rule the collection of information requirement in the proposed rule if the agency has not submitted the modified requirement to OMB for review at least 60 days prior to issuance of the final rule. These procedures for prior review are intended to avoid the difficult situation in which, after rulemakings are completed, further rulemaking may be necessary if we cannot approve the paperwork components of the rule. The Department's failure to comply with these procedures prior to publication is particularly unfortunate given the Third Circuit's concern that the final rule not be further delayed. In the course of our review, we have carefully weighed our obligations under the Paperwork Reduction Act and the concern of the court that the final standard should take effect without unreasonable delay.

As you know, the Paperwork Reduction Act requires that agencies of the Federal government obtain OMB approval before conducting or sponsoring a collection of information. Under the Act and implementing regulations at 5 CFR 1320, we are required to determine that the paperwork requirements have practical utility, that they are the least burdensome necessary for the proper performance of

the agency's functions to comply with legal requirements and achieve program objectives, and that they do not duplicate information otherwise available. Section 3512 of the Act protects the public from penalties resulting from failure to comply with collection of information requirements that are not approved under the Act.

During our review of the HCS, we conducted public meetings on the proposed paperwork provisions on April 2, 1987, and October 16, 1987, and reviewed numerous written comments. We have carefully analyzed this record, which provides additional information and new perspectives on the record upon which OSHA based the expanded rule, and, as required by the Act, have based our decision upon it. We have determined that the record does not support certain paperwork provisions and would not allow approval. Hence, pursuant to Section 3504(h)(5)(D) of the Paperwork Reduction Act and 5 CFR 1320.13(g) of the implementing regulations, we have disapproved, effective May 23, 1988, the following collection of information requirements:

- the requirement that material safety data sheets be provided on multi-employer worksites;
- coverage of any consumer product excluded from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;
- coverage of any drugs regulated by FDA in the non-manufacturing sector.

Our disapproval takes effect on May 23, 1988, the date on which the expanded standard takes effect for the non-

manufacturing sector. In the rulemaking required below, we believe the Department should take action under the Administrative Procedures Act to revise these requirements prior to the effective date (below, we suggest alternatives that may be consistent with the Paperwork Reduction Act) or collect new information that would warrant a reconsideration of our decision under the Paperwork Reduction Act.

We have approved all other paperwork requirements through May 23, 1988, but have determined that reconsideration of the definition of "article" is needed in order to achieve consistency with the Act. Therefore, pursuant to 1320.14(f) and (g) of the implementing regulations, we are instructing the Department to complete a rulemaking on this and other issues, including issuance of a notice of proposed rulemaking and a final rule. The rulemaking shall examine, at least, alternatives to the definition of "article," including a *de minimis* exemption and clarification of the concept of "normal use," and should conform the provisions of the rule relating to the manufacturing sector to the requirements in the non-manufacturing sector in light of this decision. In the course of this rulemaking, the Department shall comply with Section 3504(h) procedures to accommodate the needs of both the Administrative Procedures Act and the Paperwork Reduction Act. Our approval is conditioned on adherence to the following schedule for consideration of these paperwork provisions:

December 1, 1987: Publication in the *Federal Register* of a notice of proposed rulemaking to reconsider certain paperwork provisions of the HCS and submission of paperwork to OMB for review

January 31, 1988: Public comment period on NPRM closes

March 1, 1988: Publication in the *Federal Register* of a final rule concerning the HCS; paperwork submitted to OMB for review

Although this schedule is tight, it is very important that OSHA conclude its rulemaking to revise the standard, giving OMB sufficient time to complete review of the final paperwork provisions and the public sufficient time to understand and implement the revisions prior to the effective date of the standard.

#### Generic Hazard Communication Programs

Many commenters spoke forcefully about widespread confusion in the regulated community, particularly among small businesses, regarding their responsibilities under the HCS. Some, for example, were unsure who would be responsible for the accuracy of the MSDS information—the generator or the downstream user (1-24). Others stated that a certification or technical assistance effort was needed to give employers confidence that their efforts were in compliance with the HCS. Still others mentioned that the Federal Government had developed a Federal Generic Hazard Communication program, which contains step-by-step instructions for implementing the HCS, a model written program, and an HCS training program, in order to reduce Federal agency costs in complying with the HCS, and that a similar approach may be useful for the private sector. In fact, the single issue on which every commenter who addressed the issue agreed was the need for some sort of non-mandatory guidance from OSHA on the develop-

ment of hazard communication programs (see e.g. comments by the Small Business Administration, the Organization of Resources Counselors, AFL-CIO, National Association of Home Builders, National LP-Gas Association, American Farm Bureau Federation, Associated General Contractors of America, Associated Builders and Contractors; National Association of Wholesaler-Distributors; Petroleum Marketers Association of America, National Automobile Dealers Association, National Paint and Coatings Association, and the American Subcontractors Association, Inc.).

These comments strongly suggest that administrative actions by OSHA could reduce the paperwork compliance burden associated with the information collection provisions. Although we do not have sufficient information to determine what administrative action would be most appropriate, we believe that OSHA should examine several options, while relying to the extent possible on the private sector. We believe OSHA should consider working with the appropriate public and private groups, as well as existing OSHA advisory groups, in developing a suitable approach. Options may include the development of a generic hazard communication program or guidelines suitable for the development of generic programs by the private sector and by States, which could perhaps be certified as meeting the requirements of the HCS. Certification of private sector generic programs would continue to encourage the private market to develop programs, while also offering the employer some guarantee that the program purchased meets OSHA's expectations for compliance. OSHA could also make available any generic guidelines that were developed to any employer wishing to design his or her own plan.

Such an administrative effort by OSHA could substantially reduce the start-up paperwork burden and costs of the HCS, particularly those of small businesses. The Small Business Administration, for example, estimated that a generic program could reduce first year program development costs by 50 percent and training costs by 25 percent, for a total first-year savings of \$700 million (2-42). A generic program could also facilitate employer compliance at the earliest possible date and improve the effectiveness of programs that are developed. Although we do not believe that the Federal Government should compete with the private market that has already developed generic hazard communication programs, we believe that a great deal can be done within the boundaries of OSHA's limited resources either to supplement the private sector or to improve the usefulness of private sector programs.

By January 1, 1988, OSHA should submit a plan, which has been developed in consultation with the U.S. Small Business Administration and the Secretary of the Department of Commerce, for an administrative effort that would provide such assistance as appropriate to alleviate the start-up paperwork burdens and costs. The plan should include an outline of the intended approach and a timetable of actions necessary to complete the effort by the date of publication of the revised final rule and have it available to the regulated community. With the resubmission of the collection of information requirements in the final rule, OSHA should also submit a description of the plan and any documents necessary to implement it. We look forward to working with you to meet this condition of paperwork approval as efficiently and effectively as possible.

## Discussion

Following is a discussion of the record and the reasons for our decisions under the Paperwork Reduction Act.<sup>1</sup>

### Multi-Employer Workplaces

The HCS relies heavily on the encyclopedic Material Safety Data Sheet (MSDS) as the primary mechanism for transmitting hazard information to employers and employees. This approach is appropriate when workers face the likelihood of significant exposure to a relatively small number of chemical hazards. Other transmittal mechanisms, however, such as generalized hazard training, are likely to be equally or more effective with much less paperwork burden when the particular hazards are continually changing or when many potentially hazardous substances are present in small quantities. In such circumstances, MSDSs have little, if any, practical utility, because neither employers nor employees can predict what, where or when exposures are likely to occur or consult the MSDS before deciding how to handle the substance. Unfortunately, these are exactly the situations where the burden of maintaining and updating MSDSs would be heaviest.

The effectiveness and efficiency of the MSDS as a source of information in various situations is disputed by a number of commenters. For example, several commenters questioned the practical utility of the provision governing

<sup>1</sup> All exhibit numbers are references to OMB paperwork docket 1218-0072, which is available to the public in Room 3201, New Executive Office Building, Washington, D.C. The prefix "1" indicates that the exhibit was received in response to the April 2, 1987, public meeting, and the prefix "2" indicates that the exhibit was received in response to the October 16, 1987, public meeting.

multi-employer workplaces such as construction sites (1910.1200(e)(2)), which requires each employer to provide MSDSs at the workplace. The commenters stated that having the MSDS physically at the worksite would almost certainly be useless. They maintained that coordination and transfer of the MSDSs, either between employers or in a central location would be very difficult, primarily due to the numbers of employees and substances and the great frequency with which employees would arrive at and leave the site (Ex. 1-14, p. 85; 2-41; 2-48; 2-49). For example, some employees would be on-site for a few hours; others for months. Some employees would arrive directly from another worksite rather than from a central location. Other commenters (Ex. 1-14, p. 94) expressed doubt as to the need to have MSDSs actually on the site if they were available elsewhere or if the information were available by phone or computer, an approach that the HCS permits for employees of a single employer who work at multiple locations (1910.1200(g)(9)). Similar problems were described by commenters with regard to mobile service personnel, such as repairmen, and professional launderers.

These commenters also questioned OSHA's estimates of the number of MSDSs required in multi-employer workplaces. One commenter estimated that a single industrial launderer might need to keep on file 10,000 to 50,000 MSDSs (Ex. 2-17) because delivery personnel could be exposed to different hazards at each location where they pick up or deliver laundry. The commenter estimated that the annual costs of compliance would be far higher than OSHA's estimated second-year cost of \$16 per establishment. Another commenter stated that it would not be feasible for a mobile service employee to have hard copies of MSDSs for all hazardous chemicals in the vehicle (Ex. 2-13). Several representatives of the construction industry

estimated that a minimum of several file cabinets would be required on a construction site to maintain the MSDSs, and that compliance may be physically impossible (see, for example, comments by Associated General Contractors of America, 2-29; and Associated Builders and Contractors, 2-30).

In light of these objections, neither the preamble to the final rule nor the justification statement in the request for OMB paperwork review demonstrate the practical utility for the requirement to bring MSDSs on-site at multi-employer workplaces. Moreover, the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces. Hence, the requirement to bring MSDSs onto multi-employer worksites is disapproved effective May 23, 1988.

One approach that would be consistent with the Paperwork Reduction Act would be the addition of a third option to paragraph (e)(2)(i), in addition to the option of trading MSDSs between employers or depositing them in a central location. This third option would require employers at multi-employer worksites to keep labels intact on any containers they bring onto the worksite; to train their employees in the hazards with which they work directly, in recognition of and response to the general hazards that are likely to be introduced by other employers, and in the need to observe hazard labels on the worksite and request MSDSs when further information is needed; and to provide MSDSs to other employers upon request. Given the high rate of turnover in affected industries, such training should be transferable from worksite to worksite (Exs. 1-15, 2-21, 2-30).

This approach would ensure that all employees at a work-site would have access to all MSDSs upon request. This approach relies on labels and general hazard training to protect workers from substances brought onsite by other employers. It also leaves intact OSHA's existing requirement at (e)(2)(ii) that employers inform other employers of any precautionary measures that need to be taken to protect employees, and therefore ensures that workers are protected from unusual hazards at a multi-employer work-site, as well as the normal hazards that would be included in a generalized training program.

#### Consumer Products

OSHA exempts from this final rule any consumer product where "the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers" (1910.1200(b)(6)(vii)). This is a new exemption not contained in the existing rule, and is appropriately intended to exclude the large numbers of consumer products found in non-manufacturing workplaces. Nonetheless, this exemption is limited to consumer products that are used under certain circumstances, and hence the HCS would continue to apply to numerous consumer products present in workplaces.

The record indicates that this exemption would continue to place under the HCS large numbers of consumer products for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial. We have four major concerns:

- Consumer product labeling already provides information to identify significant hazards that may result from

use of the product and to enable users to avoid those hazards. For the overwhelming majority of consumer products that would remain subject to the standard, there is no evidence in the record that the MSDS would have practical utility beyond the information already included on the label.

- The exemption imposes a burden on the employer to "demonstrate" that exposures for each substance are the same as "normal consumer use," a burden that may be difficult to meet (2-44). More importantly, such a trigger would not exclude many situations where risks are very low. For example, is an employee who cleans and waxes floors once a week using a supermarket product exposed at the same duration and frequency as consumers? If not, should the employee be trained in the hazards of floor wax? Under OSHA's language, the employee may well be treated exactly like a worker on a chemical production line. In addition, the HCS requires that even consumer products that are not opened under normal workplace use, such as those a stock boy places on a supermarket shelf, be treated as "sealed containers," for which MSDSs and hazard training for potential spillage are required. This would result in treating a can of floor wax in a grocery store exactly the same as a 55-gallon drum of industrial chemical in a warehouse. In this regard, the National Retail Merchants Association stated, "It would be exceptionally difficult for retailers to adequately assess whether the hundreds of products they regularly sell could potentially become workplace hazards in the event of spillage" (Ex. 1-24, see also comments by the National Restaurant Association, 2-31).
- The exemption does not allow upstream suppliers to determine which products are exempted, because they

do not know how downstream employers will use them. Moreover, OSHA's explanation that downstream distributors who do not "generally" sell to employers would not be covered offers no relief to wholesalers and other consumer product distributors who have some accounts that are subject to the standard and others that are not. In fact upstream suppliers who want to ensure compliance will have no practical alternative but to assume that downstream employers are covered, and will therefore ship MSDSs and labels along with all consumer products. Thus, upstream suppliers will continue to bear all of the costs and the distribution/retail sector will continue to receive all of the hazard information for all consumer products. This is exactly what the consumer product exemption should be designed to avoid.

- The number of MSDSs involved is very large. Although OSHA estimated that the typical food store contained 11 chemical hazards and the largest 58, the Food Marketing Institute estimated that the typical supermarket would sell at least 1,200 nonfood consumer products that may be covered by the HCS (Ex. 2-32). The National Paint and Coatings Association calculated that paint manufacturers would be required to supply 7,000,000 MSDSs initially to retail establishments (Ex. 2-38).

We have therefore disapproved, effective May 23, 1988, coverage under the HCS of any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA): "Any substance to the extent it is used for personal, family or household purposes, or is present in the same form and concentration as a product packaged for distribution and

use by the general public." This language would exempt any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product. EPA concluded in its final rule on Sections 311 and 312 of SARA (52 FR 38344) that this exemption is appropriate for household or consumer products in commercial and industrial as well as household use because "the public is generally familiar with such substances, their hazards and their likely locations, (hence) the disclosure of such substances is unnecessary for right-to-know purposes." This alternative consumer products exemption would address the concern that the current HCS imposes unnecessary paperwork in many situations in which exposures and risks are trivial, and would reduce and simplify the paper work requirements:

- It makes the OSHA and EPA right-to-know paperwork requirements, which are closely linked, mutually consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for their "consumer products" into two groups: an OSHA "consumer product" and an EPA "consumer product."
- It establishes objective criteria that enable upstream and downstream employers to determine what is exempted and what is included. Upstream suppliers would not be forced to speculate as to the identity of the final user (consumer or employer?) in determining whether the product is subject to the HCS. The flow of MSDSs and labels would be restricted to unpackaged substances or substances packaged for industrial or commercial use, for which detailed hazard information would be expected to have practical utility.

#### Drugs Regulated by FDA

The standard exempts drugs in "solid, final form for direct administration to the patient (i.e., tablets or pills)." This exemption in part avoids duplication of paperwork. Drugs for human consumption are heavily regulated by the Food and Drug Administration, which requires the transmittal of detailed information downstream from the manufacturers through professional package inserts and labels. The exemption also limits the odd situation in which a drugstore owner would be responsible for training professional pharmacists about the hazards of the drugs they dispense.

Outside the manufacturing sector, however, both rationales are equally relevant to liquid drugs or drugs not in final form. OSHA does not explain why all drugs regulated by the FDA are not exempted, except to say that North Carolina has adopted a similar exemption. Yet the paperwork burdens of covering such drugs appear to be very high. The National Wholesale Druggists Association has estimated that *each* drug wholesaler, with 400 pharmacy customers and 12,000 individual products covered by the HCS, would initially be required to distribute 4.8 million MSDSs (Ex. 2-24). If capsules containing solids or liquids are covered by the HCS, another 5,520 products would be added. A similar concern was raised by the Department of Agriculture (Ex. 2-50) and the Animal Health Institute (Ex. 2-40) concerning potential duplicative paperwork for veterinary biological products. Since coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility, we have disapproved coverage of FDA-regulated drugs outside the manufacturing sector, effective May 23, 1988.

### Definition of "Article"

The HCS exemption of "articles" from the scope of the standard is conditionally approved through May 23, 1988. Although the record supports the need for an article exemption, the record does not support the existing definition of "article," particularly with regard to the lack of a *de minimis* exemption and the agency's interpretation of "normal conditions of use."

"Article" is defined as "a manufactured item: (i) which is formed to a specific shape or design during the manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result, in exposure to a hazardous chemical under normal conditions of use." OSHA explains in the preamble to the final expanded rule that "exposure" does not mean releases of "very small quantities," "a trace amount," or "a few molecules" of the hazard.

The issue raised in the record is whether an objective "de minimis" exemption should be added to the definition of "article," perhaps similar to the quantity threshold used to define "de minimis" quantities in mixtures. OSHA exempts from the HCS substances which comprise less than one percent of a mixture (0.1 percent if the substance is a carcinogen), unless "there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit (PEL) or ACGIH Threshold Limit Value (TLV), or could present a health hazard to employees" (1910.1200(g)(2)(i)(C)(1) and (2)). The one percent exclusion was included in the HCS, OSHA explained in the preamble to the 1983 final rule, "to absolve the employer

from having to evaluate and list chemicals present in mixtures in small quantities, which are not likely to result in substantial exposures . . . the one percent cutoff was justified on the basis that it appeared to be protective and was considered to be reasonable by a number of affected parties" (48 FR 53290).

The record contains a number of statements that the absence of similar "de minimis" language in the definition of "article" results in the standard covering many items containing small amounts of hazardous substances and presenting low exposures to workers (one commenter noted that even the *Federal Register* volume in which the HCS was published emitted a measurable amount of formaldehyde, Ex. 1-25, see also Exs. 1-14, pp. 49-55; 2-36; 2-44). The lack of consistency between mixtures and articles also poses the anomalous possibility that exempt substances in a liquid or powdered mixture will become subject to the HCS when shaped or incorporated into a solid article, although the possibility of employee exposure is almost surely reduced.

The evidence is convincing that the current definition of "article" would indeed result in the inclusion of many items that present trivial risks, and that OSHA's preamble discussion of the issue is insufficient to exclude those items. It is particularly compelling that OSHA has in essence included a "de minimis" exemption for mixtures, for reasons that appear to apply equally well to manufactured items. Hence, the current "article" exemption appears to include many items under the HCS for which the paperwork requirements would have no practical utility. We therefore believe that OSHA should reconsider the definition of article. An approach more consistent with the Paperwork Reduction Act would exclude de minimis

exposures expressly, and define such exposures in the same terms used in the exclusion for trace components of mixtures. This approach would result in a consistent treatment of solids and chemical mixtures under the standard by exempting many items that emit small amounts of potentially hazardous substances, but not in sufficient quantities to result in significant exposures. It may also result in lower exposures by encouraging manufacturers to reduce trace elements to below the threshold. The Department is instructed to complete by March 1, 1988 a rulemaking to reconsider a *de minimis* exemption in the definition of "article."

A related issue that appears to cause confusion in the regulated community is the coverage of items such as metal or plastic pipes. These objects would appear to be "articles" since they are formed to a specific shape or design, are dependent for their end-use function on their shape or design, and would not release or otherwise result in exposure to hazardous chemicals under normal conditions of use, that is, when functioning as pipes. Yet, in a new provision exempting solid metals from labeling requirements under certain conditions, OSHA has added language that appears to suggest that such items are not "articles" if workers could be exposed to a hazard during operations such as installation or alteration of the item.

OSHA apparently intended this interpretation to address situations in which downstream employees who shape, cut, drill, or otherwise handle the solid object could be exposed to hazards, and would therefore require substance-specific hazard information about each solid object. OSHA's preamble discussion suggests that only potential exposures related to installation need be considered by the upstream supplier; the supplier does not need to consider

"the possibility that exposure could occur when the item is repaired or worked on" (52 FR 31865). Nowhere does this distinction appear in the rule, however, and the question arises as to whether a practical distinction can be drawn between "installing," "working on," and "repairing."

It is difficult to understand why OSHA would consider such operations "normal conditions of use." If "normal conditions of use" apply to any possible exposure to any worker downstream, then the "article" exemption is exceedingly limited. Since manufacturers and distributors would have no way of knowing how downstream employers will treat or change the solid object, then, regardless of its hazard during its intended use, the object would be covered under the HCS, and MSDSs and labels would accompany it. The result of this interpretation would be a flood of paperwork accompanying solid objects that under normal conditions of use present no hazard at all. "Contractors will be virtually buried in MSDSs," stated the American Supply Association (Ex. 2-25).

Within the manufacturing sector, where solid objects may constitute the raw materials for extensive further processing, there may be some utility to this flow of information. Outside the manufacturing sector, however, the practical utility even in cases where such workers may be exposed seems dubious at best, and certainly has not been demonstrated in the record. Consider the case of a repairman who replaces pipe. To cut and remove existing pipe safely, he must have sufficient information and training to recognize different types of pipe and the hazards they may pose without benefit of a substance-specific MSDS or a label on the pipe. He needs no additional information to

install the new pipe safely. Clearly, in these cases the repairman would benefit far more from generic hazard training on pipes than from access to substance-specific information on new pipes. In such circumstances, it is difficult to see that the practical utility is sufficient to balance the paperwork burden imposed.

The record suggests that the detailed substance-specific information provided on the MSDS can be useful in a controlled work environment, such as a manufacturing facility, in which the employer knows what hazards are present and where. Detailed substance-specific information does not, however, seem to offer much practical benefit in uncontrolled environments, such as that faced on a construction site or by a repairman, where the employer knows generally but not specifically what hazards the employee will face, or when, or where. In uncontrolled situations, generic hazard training seems much more relevant to protecting workers from the array of hazards they may face and the materials handling decisions that they must make throughout the workday.

Outside the manufacturing sector, there is likely to be little practical utility to a requirement that MSDSs and labels accompany solid objects that would be "articles" under normal conditions of use. Although one possible option would be to define all such items as "articles" exempt from the standard, there may be alternatives, such as reliance on general hazard training, that would also be consistent with an employee's need to know and the requirements of the Paperwork Reduction Act. The Department is instructed to complete by March 1, 1988, a rulemaking to reconsider its present interpretation of "normal consumer use" and fully explore these alternatives. In addition, if OSHA

believes that further rulemaking is needed in specific cases to protect downstream users who handle or modify particular "articles," we look forward to assisting OSHA in developing a means for transmitting hazard information that is consistent with the Paperwork Reduction Act.

A similar concern has been expressed with regard to scrap metal, which appears to present special problems (1-22). Not only does scrap metal contain a great many substances, requiring voluminous MSDS and labels, but it also appears to pose little risk of significant exposure. We suggest that scrap metal that was classified as an "article" before it became scrap continue to fall under the "article" exemption.

#### Summary

In summary, the record does not demonstrate that certain paperwork requirements meet the criteria established in the Paperwork Reduction Act and its implementing regulations. Hence, we are disapproving the following paperwork requirements in the HCS, effective May 23, 1988:

- the requirement that material safety data sheets be provided on multi-employer worksites;
- coverage of any consumer product that falls within the "consumer products" exemption included in Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;
- coverage of any drugs regulated by FDA in the non-manufacturing sector.

We are approving the remainder of the paperwork provisions in the HCS until May 23, 1988, on the condition

that the agency complete rulemaking according to the schedule detailed earlier. The rulemaking shall consider, at least, alternatives to the definition of "article," including a *de minimis* exemption and clarification of the concept of "normal conditions of use," and shall conform the requirements on the manufacturing sector with the requirements on the non-manufacturing sector in light of this decision.

The Department shall, pursuant to 1320.13(j) and 1320.14(f), publish a notice in the *Federal Register* on the next practicable publication date to inform the public of OMB's decision under the Paperwork Reduction Act. The notice shall include the text of this letter and any other information the Department feels is necessary and appropriate.

We look forward to working with you and your staff to ensure that the collection of information provisions of the HCS meet the goal of protecting employees from hazardous exposures in a manner consistent with the requirements of the Paperwork Reduction Act.

Sincerely,

/s/ WENDY L. GRAMM

Wendy L. Gramm

Administrator for Information  
and Regulatory Affairs

cc: Honorable John A. Pendergrass  
Assistant Secretary for  
Occupational Safety and Health

Honorable C. William Verity  
Secretary of the Department of Commerce

Honorable James Abdnor, Administrator for  
Small Business Administration

## APPENDIX F

U.S. Department of Labor

Jan. 14, 1988

ASSISTANT SECRETARY FOR  
OCCUPATIONAL SAFETY AND HEALTH  
WASHINGTON, D.C. 20210

[Seal]

The Honorable Wendy L. Gramm  
Administrator for Information and  
Regulatory Affairs  
Office of Management and Budget  
Washington, D.C. 20503

Dear Dr. Gramm:

I have been asked to respond on behalf of Assistant Secretary for Administration and Management Thomas C. Komarek to your letter of October 28, 1987, detailing the Office of Management and Budget (OMB) decision regarding the collection of information requirements in OSHA's hazard communication standard (HCS) promulgated August 24, 1987.

Citing authority under section 3504(h)(5)(D) of The Paperwork Reduction Act (PRA) and 5 CFR 1320.13(g) of OMB's implementing regulations, your office disapproved, effective May 23, 1988: (1) the requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product excluded from the definition of "hazardous chemical" under section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drug regulated by the Food and Drug Administration (FDA) in the non-

manufacturing sector. In addition, citing authority in 5 CFR 1320.14(f) and (g), all other paperwork requirements in the HCS were approved through May 23, 1988, on condition that OSHA adhere to a rulemaking schedule outlined in your letter to consider, at least, alternatives to the standard's "article" definition including a *de minimis* exemption and clarification of the concept of "normal conditions of use" of such products. Lastly, your office conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industry to alleviate start-up paperwork burdens and costs.

In light of OMB's decision, OSHA will initiate new rulemaking which will consider the issues specified in your letter. However, the rulemaking schedule delineated in your letter does not provide sufficient time to draft the notice of proposed rulemaking or satisfy procedural stages of the rulemaking not included in your schedule but which OSHA concludes are necessary. One rulemaking procedure not addressed by OMB involves OSHA's consultation with the Advisory Committee on Construction Safety and Health. Section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333, and 29 CFR 1911.11 of OSHA's regulations, require the Agency to consult with the Advisory Committee when formulating a rule promulgating, modifying or revoking a standard applicable to employment in construction work. A rulemaking to consider modifying provisions of the HCS applicable to construction work, which OSHA believes this rulemaking entails, requires the Agency to consult with the Advisory Committee.

The second public participation procedure not provided for by the OMB schedule involves public hearings. Under

the OSH Act, an informal hearing is required if an interested party requests one upon the filing of a written objection to the proposal [29 U.S.C. § 655(b)(3); 29 CFR 1911.11(b)(4), (c), (d)]. In light of the regulated community's substantial interest in the HCS, a request for a public hearing is very likely.

OSHA is committed to completing the rulemaking in the shortest time possible, preferably by the May 23 effective date of the rule. However, OSHA believes that even if all phases of drafting, clearance and public participation are completed in an expedited fashion, it is likely that the rulemaking process may extend beyond the May 23 date.

Members of your staff have indicated that, except for the three items specifically disapproved in your letter of October 28, you would agree to extend approval of all other collection of information requirements in the HCS until the end of September 1988, as long as OSHA initiates an expedited rulemaking. It is our understanding that this extension of recordkeeping approval would include the current "article" definition for the duration of the period required for consideration of the proposed changes to the definition initiated by your office. As you point out in your October 28 letter, OSHA acknowledges in the preamble to the August rule that exposures to releases of "very small quantities" of chemicals are not covered by the rule. Thus, absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply. Therefore, except for the three OMB disapproved requirements of the HCS, the remaining provisions will be effective and enforceable as scheduled in the standard.

Regarding the development of a plan to provide additional guidance and assistance to the regulated community in

order to reduce the paperwork compliance burden, please be assured that OSHA is expeditiously examining various alternatives and drafting a plan of action. OSHA intends to review this draft plan with the Small Business Administration and the Department of Commerce in the very near future and to submit it to your office at the earliest possible date.

Sincerely,

/s/ JOHN A. PENDERGRASS

John A. Pendergrass  
Assistant Secretary

APPENDIX G

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

[Seal]

Apr. 13, 1988

Honorable Thomas C. Komarek  
Assistant Secretary for  
Administration and Management  
Department of Labor  
Washington, D.C. 20210

Dear Tom:

Pursuant to the Paperwork Reduction Act (the PRA — 44 U.S.C. Chapter 35), we have completed our review of the request received from your office on March 7, 1988, to extend our prior approval of portions of the Hazard Communication Standard (HCS) past the current expiration date of May 23, 1988. Attached to your request for extension of approval was the January 14, 1988 letter from Assistant Secretary for Occupational Safety and Health John Pendergrass.

In his letter, Assistant Secretary Pendergrass assured us that, while the Department may not be able to complete a rulemaking by May 23, 1988, to reconsider the issues identified in our October 23, 1987 decision, the Department is "committed to completing the rulemaking in the shortest time possible. . . ." We also met with members of the Department on February 17, 1988, concerning the develop-

ment of a compliance assistance program. We understand that, despite lengthy delays, both of these efforts are proceeding, and that they will be completed expeditiously.

This letter is to inform you of our decision in light of these continuing efforts by the Department.

#### Approved Provisions

The HCS, a comprehensive regulatory program first put fully into effect for manufacturers on May 25, 1986, pursuant to the Occupational Safety and Health Act of 1970, is intended to provide employees with information about the potential hazards of chemicals to which they may be exposed on the job. It requires chemical manufacturers and importers to evaluate the hazards of chemicals they produce or import, to develop the technical hazard information for material safety data sheets (MSDS) and labels for hazardous substances, and to transmit the MSDSs and labels downstream to users of these substances. All employers are required to pass this information on to their workers through a comprehensive hazard communication program that includes a written hazard communication program and individual training.

Based on considerations of practicality, duplication, and the utility of coverage, the HCS incorporates several specific exemptions for products that are unlikely to pose risks to workers, such as food in a retail establishment packaged for sale to consumers, or products regulated by other Federal agencies. Section 1910.1200(b)(6)(iv) of the HCS exempts "articles" from the scope of the standard. An article is defined as:

a manufactured item: (i) which is formed to a specific shape or design during manufacture; (ii) which has

end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use.

In our October 23, 1987 decision, we determined that neither the record nor the Department's statement of justification supported the definition of "article" in part because the definition contained no express "de minimis" exemption regarding trivial risks. Hence, the definition did not clearly exempt from the HCS many items that emitted very small quantities of substances and for which the paperwork burdens of transmitting hazard information would have no practical utility. In response to our concerns, the January 14, 1988 letter from Assistant Secretary Pendergrass attached to your request for extension of approval clarified that "absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply." This clarification serves to exclude situations that involve trivial risks. Given these assurances that the rule does not cover releases of small quantities from products in the absence of evidence that the release presents a health hazard to employees, we have extended approval of the existing definition of "article," as clarified by the January 14 letter. In other words, our approval is limited to what you have requested, and therefore does not encompass collection of information requirements involving articles when there is an absence of evidence that small releases constitute a health hazard.

We have also extended our prior approval of all collection of information requirements in the HCS through April 1991, except the three provisions that we disapproved on

October 23, 1987. The approved requirements include the information collection requirements for hazard determination, written hazard communication programs, information and training programs, development and transmittal of MSDSs, labels and other appropriate forms of warning, and trade secrets. These paperwork provisions were approved in 1983 for the manufacturing sector (in 1986 for the trade secrets provisions).

This decision to extend our prior approval of portions of the HCS was reached after a careful balancing of several factors, including the importance of implementing on schedule those paperwork requirements that the existing record supports as consistent with the PRA, the clear concerns of the U.S. Court of Appeals for the Third Circuit that the HCS be effective without further delay, the Department's unsatisfactory record of compliance with the conditions of clearance contained in our October 23, 1987 decision, and the Department's and our obligations under the PRA.

Our extension of prior approval of portions of the HCS is made with the understanding that the Department will expeditiously inform the regulated community of this decision, will provide as soon as possible clear guidance to employers of their responsibilities in light of this decision, and will advise employers of the scope of the "article" exemption in light of the January 14, 1988 letter from Assistant Secretary Pendergrass and of this decision.

#### Disapproved Provisions

In our October 23, 1987 decision under the PRA, we disapproved three provisions:

- the requirement that material safety data sheets be provided on multi-employer worksites;
- coverage of any consumer product excluded from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986;
- coverage of any drugs regulated by FDA in the non-manufacturing sector.

None of these provisions had been part of the original HCS, but rather first appeared in the August 24, 1987 rule extending coverage of the HCS to the nonmanufacturing sector. Although these provisions by themselves do not represent a substantial portion of the enormous paperwork burden imposed by the entirety of the expanded HCS (54 million hours in the first year alone), they do represent significant burdens for which the record did not demonstrate practical utility (a full discussion of the record is contained in our October 28, 1987 letter). We continue to disapprove these three provisions. Hence, under the PRA, these provisions will not become effective or enforceable on May 23, 1988.

#### The Department's Response to Our October 23, 1987 Decision

In our October 23, 1987 decision under the PRA, we determined that the record did not support certain provisions and would not allow approval. Hence, we disapproved the three requirements listed above. We also determined that reconsideration of the definition of "article" was needed in order to achieve consistency with the PRA. The reasons for our decision are fully explained in the October 28, 1987 letter.

We conditioned further approval on actions to be undertaken by the Department:

- Pursuant to 5 CFR 1320.14(f) and (g), we instructed the Department to complete a rulemaking examining alternatives to the definition of "article," including a de minimis exemption and clarification of the concept of "normal use," and conforming the language of the rule in light of our decision. We instructed the Department to publish a proposal by December 1, 1987, and a final rule by March 1, 1988. We explained that it was very important that OSHA promptly conclude its rulemaking to revise the standard, thereby giving OMB time to complete review of the final paperwork provisions and the public sufficient time to understand and implement the revisions prior to the effective date of the standard.
- We also determined that an administrative effort by OSHA to assist the regulated community to understand and comply with the standard could substantially reduce the start-up paperwork burden and costs of the standard, particularly those of small business. We instructed the Department to submit a plan by January 1, 1988, that would provide such assistance as appropriate.

These timetables were not met. In his January 14, 1988 letter, Assistant Secretary Pendergrass advised us that OSHA would not meet the timetable established for the rulemaking, and may not be able to complete a rulemaking until after the May 23rd effective date, but, as previously cited, he assured us that the Department is now "committed to completing the rulemaking in the shortest time possible. . . ." OSHA has also informed us that the major elements of a plan for compliance assistance will probably not be available until early summer, after the ef-

fective date of the standard. We understand that the Department is now moving forward on each of these efforts, and that they will be completed as expeditiously as possible.

#### Discussion of Decision

Despite the Department's failure to meet the conditions of clearance, however, we have determined that extension of approval of the previously-approved provisions is consistent with the PRA. We determined in our October 23, 1987 decision that the existing record supports these provisions as consistent with the Act. These approved paperwork provisions, which include hazard determination, written hazard communication and training programs, MSDS development and transmittal, and labelling, comprise the heart of the HCS. For the vast majority of workplaces, these provisions are largely independent of the specific substances or products for which MSDSs are generated. Indeed, the HCS is designed so that the basic mechanisms for transmitting hazard information will not require substantial revision as the substances in the workplace and consequently the number of MSDSs changes over time. Hence, our disapprovals of coverage for certain products should not substantially affect compliance with the other provisions of the HCS.

Commenters have requested that OMB not extend approval of the previously-approved provisions of the HCS until the Department has completed a compliance assistance program and its rulemaking, in light of the difficulty of implementing a "partial" rule and of OSHA's failure to provide any compliance assistance thus far. The Coalition of Construction Industry Trade Associations, for example, maintains that, "there is no way that construction in-

dustry employers can 'develop, implement and maintain at the workplace a written hazard communication program' . . . when the parameters of multi-employer worksite disclosure and training are yet to be determined" (see January 22, 1988 letter from the Coalition of Construction Industry Trade Associations and February 9, 1988 letter from the Associated General Contractors of America in OMB paperwork docket 1218-0072). The National Association of Wholesaler-Distributors also requested that OMB not extend approval of the requirements applicable to the nonmanufacturing sector because such extension would "generate chaos in the nonmanufacturing sector and cannot be justified."

The concerns of these commenters are largely based on the possibility that the standard and OMB's decision under the PRA will change dramatically as a result of the rulemaking. Although change is always possible, any such change would be fully considered during the rulemaking process. Of course, in order for OMB to grant PRA approvals, any changes must offer sufficient practical utility to justify any incremental paperwork burden they impose, including the burden of revising already-developed written programs. Moreover, as stated above, we are continuing to disapprove the previously-disapproved provisions; the rulemaking should of course conform the rule to these disapprovals.

Therefore, the confusion and potential paperwork duplication resulting from the delayed agency rulemaking, while regrettable and avoidable, do not, on balance, outweigh the value of putting into effect the key components of the standard (see also February 2, 1988 letters from the Building and Construction Trades Department of the AFL-CIO, and from the AFL-CIO and the United Steel

Workers of America, and the February 2, 1988 letter from the Working Group on Community Right to Know concerning the potential impact of the OMB decision on Title III of the Superfund Amendments and Reauthorization Act of 1986, in OMB paperwork docket 1218-0072).

Our extension of approval is, of course, based on the existing record and may be revised on the basis of new information. Accordingly, if any new information concerning this standard is collected in the course of further rulemaking proceedings, we will review that information to determine if reconsideration of our decisions under the PRA is warranted. Absent evidence that approved provisions are clearly inconsistent with the PRA, or that alternatives to the disapproved provisions would clearly be consistent with the PRA, however, we have no basis for changes in our prior decisions. If the paperwork already implemented is to carry out effectively the goals of the HCS, there should be stability and predictability, not continuing tumult and change.

The Department shall publish a notice in the *Federal Register* on the next practicable publication date to inform the public of OMB's decision under the PRA. The notice shall include the text of this letter. We trust that the Department will continue to make progress in meeting the terms of our decisions under the PRA.

Sincerely,

/s/ JAMES B. MACRAE, JR.  
James B. MacRae, Jr.  
Acting Administrator and  
Deputy Administrator  
Office of Information  
and Regulatory Affairs

58a

cc: Honorable John A. Pendergrass  
Assistant Secretary for  
Occupational Safety and Health

Honorable C. William Verity  
Secretary of the Department of Commerce

Honorable James Abdnor, Administrator for  
Small Business Administration

~~1987~~ 3 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,  
v. *Petitioners,*

OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION, *et al.*,  
*Respondents.*

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
v. *Petitioners,*

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

On Petitions for Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit

**BRIEF OF UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC AND BUILDING AND  
CONSTRUCTION TRADES DEPARTMENT, AFL-CIO  
IN OPPOSITION**

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## QUESTION PRESENTED

The petitions take issue with the Third Circuit's ruling that "information collection requests" subject to approval by the Office of Management and Budget under the Paperwork Reduction Act do not include regulations under which information is to be provided only to private parties rather than to government agencies. The question presented is whether that ruling—which is not in conflict with that of any other circuit and which concerns a subject that is extremely unlikely to be the subject of litigation—is worthy of review in a case in which its resolution would not affect the judgment below.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

Nos. 88-1075 and 88-1434

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,  
*Petitioners,*

v.

OCCUPATIONAL SAFETY AND  
 HEALTH ADMINISTRATION, *et al.*,  
*Respondents.*

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

On Petitions for Writs of Certiorari to the United States  
 Court of Appeals for the Third Circuit

BRIEF OF UNITED STEELWORKERS OF AMERICA,  
 AFL-CIO, CLC AND BUILDING AND  
 CONSTRUCTION TRADES DEPARTMENT, AFL-CIO  
 IN OPPOSITION

Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1075 and 88-1434, which seek review of the decision

in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988).<sup>1</sup>

### STATUTES INVOLVED

In addition to the sections of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* ("PRA") which are reproduced in the Petition in No. 88-1434 at 1-3, this case also involves § 3504(a) of the PRA, 44 U.S.C. § 3504(a), which provides as follows:

The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of records, agency sharing and dissemination of information, and acquisition and use of automatic data processes, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

The case involves as well the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act"), and particularly §§ 6(b)(5) and 6(b)(7), 29 U.S.C.

<sup>1</sup> The petition of Associated Builders and Contractors ("ABC") also seeks review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988). Review of the latter decision is sought as well by other industry petitioners in Nos. 88-1070 and 88-1385.

USWA and BCTD have today filed a brief in opposition in Nos. 88-1070, 88-1075 and 88-1385, which demonstrates that further review of the decision in *Associated Builders and Contractors v. Brock* is not warranted. That would remain the case even if, contrary to our submission, the Court were to grant certiorari to review the decision in *United Steelworkers of America v. Pendergrass*. Although the two cases grow out of the same OSHA Standard, the legal issues presented in each are completely distinct.

§§ 655(b)(5) and (7). Those sections provide in pertinent part as follows:

### Section 6(b)(5):

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

### Section 6(b)(7):

Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

. . . . .

The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical exami-

nations, as may be warranted by experience, information, or medical or technical developments acquired subsequent to the promulgation of the relevant standard.

## STATEMENT

### 1. History and Provisions of the Hazard Communication Standard

In November 1983 the Occupational Safety and Health Administration ("OSHA") promulgated a Hazard Communication Standard ("the Standard" or "HCS"). The Standard is based on OSHA's determination that lack of knowledge on the part of employees regarding the chemical hazards the employees confront on the job is one of the prime causes of occupational illness and injury. See 48 Fed. Reg. 53282-84, 53321 (1983); 52 Fed. Reg. 31853, 31868-69 (1987).<sup>2</sup>

<sup>2</sup> The Standard requires chemical manufacturers and importers to evaluate chemicals they produce and import to determine if they are hazardous. 29 C.F.R. § 1910.1200(d)(1). For each chemical determined to be hazardous, a material safety data sheet ("MSDS") must be developed and provided to employers, § 1910.1200(g)(1), (6); and containers of hazardous chemicals must be labeled by the manufacturer or importer with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

With respect to so-called "downstream" employers—i.e., employers other than chemical manufacturers, importers and distributors—the HCS imposes much less extensive obligations. Those employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. Thus, these employers must (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8); (2) see to it that containers of hazardous chemicals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200(f)(5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop and maintain a written hazard communication program that describes how the employer will meet the requirements described above, § 1910.1200(e)(1).

The Office of Management and Budget (OMB), purporting to act under the authority of the Paperwork Reduction Act (PRA), reviewed the provisions of the 1983 Standard and approved them without exception. See 48 Fed. Reg. 53280 (1983).

The 1983 Standard covered only chemical manufacturers, importers and distributors, and employers in the manufacturing sector of the economy as defined by Standard Industrial Classification (SIC) Codes 20 through 39. On petitions for review of the Standard filed in the Third Circuit, that court held, *inter alia*, that OSHA's rationale for confining the Standard to the manufacturing sector was legally invalid, and the Secretary was directed "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) ("USWA I"). When OSHA delayed in carrying out that mandate, the Third Circuit issued a second decision directing the Agency to act on the basis of the original rulemaking record and to complete its reconsideration within sixty additional days. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) ("USWA II").

Subsequently, on August 24, 1987, OSHA promulgated the revised Standard, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). With three modifications that are pertinent here, the substantive provisions of the revised HCS are the same as those approved by OMB in 1983; those provisions simply apply now to all employers, rather than only those engaged in manufacturing.

The three modifications are as follows. First, the revised Standard includes a new provision dealing with multi-employer worksites, which provides that if circumstances are such that the employees of one employer may

be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter must either provide copies of the MSDSs for those chemicals to the other employer, "or . . . make [the MSDSs] available at a central location in the workplace." § 1910.1200 (e) (2). Second, OSHA added a provision exempting from the coverage of the HCS any drug that is "in solid, final form for direct administration to the patient." § 1910.1200 (b) (6) (viii). Third, OSHA added an exclusion for any "consumer product," as defined in the Consumer Product Safety Act, "where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." § 1910.1200 (b) (6) (vii).

## 2. OMB's Disapproval of Three Provisions of the Standard

On September 10, 1987, OSHA submitted the revised Standard to OMB for review. On October 23 the Department of Labor was notified that OMB disapproved the three new provisions just described.

With respect to the provision requiring employers at multi-employer worksites to exchange MSDSs in certain circumstances, OMB devoted most of its discussion to comments that had been made by industry groups regarding the alleged difficulty of complying with this provision, *see* Pet. App. at 30a-32a, including, for example, a complaint that "a minimum of several file cabinets would be required . . . ." *Id.* at 32a. OMB asserted that OSHA had not "demonstrate[d] the practical utility for th[is] requirement," *id.*, and opined that "the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces," *id.*

With respect to the exclusion of certain drugs, OMB's objection related only to employers "[o]utside the manufacturing sector." Pet. App. at 37a. As to those employers, OMB asserted that OSHA "does not explain why all drugs regulated by the FDA are not exempted . . . , *id.*;" and OMB expressed the view that "coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility," *id.*

With respect to consumer products, OMB declared it was not enough for OSHA to exclude from the HCS products that are used in the workplace in the same manner, and with the same duration and frequency of exposure, as the products are used by consumers; OMB insisted that OSHA should "exempt any substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. at 36a (emphasis added). OMB justified its approach largely on the ground that it would simplify the compliance tasks of employers. *Id.* at 34a-36a.

In the wake of OMB's action USWA and Public Citizen, Inc. filed in the Third Circuit a "Motion for Further Relief With Respect to Prior Decisions of This Court," urging that the Secretary of Labor and the Director of OMB be "enjoin[ed] . . . from taking any further action in derogation of the [Third Circuit's] orders in [*USWA I* and *II*]," and urging that the Secretary and the Director be held in civil contempt.

## 3. OSHA's Rejection of OMB's Conclusions

While that motion was *sub judice* OSHA published a Notice of Proposed Rulemaking in which, *inter alia*, the Agency solicited public comment on OMB's critique of the three provisions of the HCS at issue. *See* 53 Fed. Reg. 29822-56 (1988). Without explicitly rejecting OMB's views, OSHA explained in detail the justifications

for each of the three provisions OMB had disapproved, and proposed that no changes be made in the provisions notwithstanding OMB's views.

With respect to multi-employer worksites, OSHA noted that several participants in the rulemaking, including construction industry employer associations, had emphasized the importance and feasibility of making MSDSs available at the workplace for *all* hazardous chemicals to which an employee may be exposed, whether the chemical is brought to the site by his own employer or by another employer. *Id.* at 29843-44. The Agency further noted that its Advisory Committee on Construction Safety and Health had reviewed the multi-employer worksite provision as promulgated by OSHA, and had raised no objections to "the provision for MSDSs to be made available on multi-employer worksites." *Id.* at 29844. OSHA stated that the Agency "still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees." *Id.* at 29845.<sup>3</sup> However, the Agency invited further comment on this issue and on "OMB's suggested approach." *Id.*

With respect to the scope of the exclusion of drugs, OSHA noted that the exclusion the Agency had originally fashioned (covering all drugs in solid form) is quite broad, *id.* at 29838-39, and that other drugs were not excluded "in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies," *id.* at 29839, and "since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected." *Id.* OSHA cited recent experience reported by the American Industrial Hygiene Association confirming that exposure

<sup>3</sup> Although OMB had suggested that labels and training could substitute for MSDSs, *see* Pet. App. at 32a; Pet. at 25 n.15, OSHA cited testimony establishing that such is not the case. 53 Fed. Reg. 29844.

of health care employees to drugs that are not in solid form can indeed cause serious occupational health problems. *Id.* Accordingly, although OSHA proposed one modification of the provisions of the Standard with respect to drugs,<sup>4</sup> the Agency did not propose to adopt OMB's approach of "totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces," but did invite comment on this suggestion. *Id.* at 29839.

With respect to consumer products, OSHA explained in detail (i) that the labels and inserts provided with consumer products generally do not include the kind of hazard information that is needed when the product is used in an occupational setting, and (ii) that so-called "consumer products" are responsible for an extremely large number of occupational illnesses and injuries. *Id.* at 29834-35. The Agency observed that the rulemaking record had conclusively established those points. *Id.* at 29835-36. OSHA reiterated that this is why the Standard provides an exemption "tied to type and extent of exposure," *id.* at 29836, which "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products . . . , and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." *Id.*, quoting 52 Fed. Reg. 31863. OSHA therefore did not propose any change in the consumer product exemption as originally promulgated, but again invited comment on OMB's contrary view. *Id.* at 29838.

#### 4. The Decisions Below

Thereafter, on August 19, 1988, the Court of Appeals granted USWA and Public Citizen's motion for further relief in part, holding that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with [the

<sup>4</sup> The proposal would allow certain FDA-approved documents to be considered MSDSs for purposes of the HCS. *Id.* at 29839.

Third Circuit's] orders [in *USWA I* and *II*]," Pet. App. at 12a-13a, and directing the Secretary to publish forthwith a notice that the three provisions disapproved by OMB "are now effective." Pet. App. at 13a. The court declined, however, to hold the agency officials in contempt. *Id.*

In its opinion the Third Circuit determined that OMB's action is not justified by the PRA. In reaching that result the court relied on *two independent grounds*, Pet. App. at 8a: *first*, that the provisions of the HCS at issue do not constitute "information collection requests" within the meaning of 44 U.S.C. §§ 3504(c) (1) and (2), and therefore are not subject to OMB review and approval; and *second*, that OMB's action is foreclosed by 44 U.S.C. § 3518(e), which provides that the PRA does not increase OMB's authority "with respect to the substantive policies and programs of . . . agencies . . .," and 44 U.S.C. § 3504(a), which provides that OMB's authority "shall be exercised consistent with applicable law." See Pet. App. at 8a-11a.

### ARGUMENT

The Government's petition testifies to the raw force the Budget Bureau brings to getting its way, right or wrong, within the Executive Branch and the inability of the Cabinet-level Departments to temper OMB's will for power with more mature and balanced professional judgments. As we now show, measured by the established criteria for invoking this Court's jurisdiction, this is a *certiorari* petition that should never have been filed and that should be denied.<sup>5</sup>

<sup>5</sup> The ABC *certiorari* petition in No. 88-1075, which, as we noted at the outset, also covers questions raised in a companion case below, makes essentially the same points as the Government's petition in No. 88-1434 and does so without diverging from, or adding to, the Government's arguments. For simplicity's sake, we have therefore organized our response around the Government's papers. Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition in No. 88-1434 and the appendix to that petition.

1. The question on which the Government concentrates its attention—the meaning of the term "information collection request" in the Paperwork Reduction Act (PRA)—is presented only indirectly and as the result of an idiosyncratic proceeding quite unlikely to be replicated. Moreover, the meaning of that term is not determinative of any substantive issue between the parties to this case; the decision below rests on multiple, alternative grounds and the Government does not come close to showing that these alternative bases are in any way infirm.

(a) As the Government's petition recognizes, "[t]he specific issue before the [Third Circuit] was whether the Secretary [of Labor] had complied with the court's previous order requiring the Secretary to extend a hazard communication standard to the non-manufacturing sector." Pet. at 20. And, the Third Circuit's ultimate determination was that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with th[at] order[]." Pet. App. at 12a-13a.

That determination rests *primarily* on the Third Circuit's construction of its own prior orders and on that court's judgment of what was required of the Secretary of Labor in the way of compliance after a long drawn out proceeding that had twice before resulted in judicial proceedings, and only *secondarily* on the Third Circuit's views concerning OMB's authority under the PRA.

Indeed, except in the truly extraordinary context presented here, it is unlikely in the extreme that the PRA will ever generate any legal controversy, much less a recurring controversy, requiring this Court's intervention. In the normal course, OMB review of "paperwork" requirements under the PRA begins *when a notice of proposed rulemaking is published*. The PRA provides that agencies are to give OMB notice of such proposed rulemaking, and that OMB must file public comments in response to the notice or lose all authority to disapprove any provisions of the proposed regulation. 44 U.S.C. § 3505(h) (4). If public comments on the proposal are

submitted, *see* 44 U.S.C. § 3505(h) (1), (2), OMB may then disapprove a provision of the agency's final rule only "if the agency's response to [OMB's] comments . . . was *unreasonable*." 44 U.S.C. § 3505(h) (5) (C) (emphasis added).

To put this in concrete terms, if the statements in OMB's decision disapproving the three provisions at issue here had been submitted as comments on a proposed rule, and if OSHA had rejected OMB's suggestions for the reasons that OSHA has now expressed in the August 1988 Federal Register statement discussed *supra* at 7-9, OSHA's position could not be characterized as "unreasonable," and OMB would therefore have had no right under the PRA to disapprove OSHA's decision. That this sequence of events did not occur here is due solely to the unique procedural posture of this rulemaking. *See supra* at 5. In the ordinary situation, then, the provisions of the PRA itself would have prevented the OMB/OSHA clash that gave rise to the need for a judicial resolution.<sup>6</sup>

(b) While the Government's petition strives to make it appear that this case turns on the proper construction of "information collection request," in fact the Third Circuit also found OMB's action to be invalid on an independent ground: *viz.* that OMB had transgressed the limitations in the PRA requiring OMB to exercise its

<sup>6</sup> The Government's petition asserts that even "[a]ppplied only to the specific agency action at issue here, [the decision below] would have substantial consequences: it would eliminate OMB paperwork review of one of the most significant paperwork requirements in regulatory history." Pet. at 17. That is pure hyperbole.

Only three provisions of the HCS are at issue here, and those three provisions hardly constitute "one of the most significant paperwork requirements in regulatory history." What is more, now that OSHA has so thoroughly debunked OMB's objections to those provisions and has slated further rulemaking with respect to those objections, *see supra* at 7-9, it is far from clear that OMB's erroneous views would have had "substantial consequences" in terms of the ultimate content of the HCS even if the Third Circuit's decision had never been written.

authority "consistent with applicable law," 44 U.S.C. § 3504(a), and providing that the PRA "shall not be interpreted as increasing . . . the authority of . . . [OMB] . . . with respect to the substantive policies and programs of . . . agencies. . . .," 44 U.S.C. § 3518(e).

The Government attempts to wish away these restrictions on OMB's authority in a footnote, asserting that "[t]hese provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has a responsibility to review whether the agency has chosen effective information collection methods to *achieve* those objectives." Pet. at 24 n.14 (emphasis in original).

Even if this distinction between "objectives" and "methods" had any operational content, more than the Government's *ipse dixit* would be required to establish the unlikely proposition that when Congress referred to "applicable law" (§ 3504(a)) and "substantive policies and programs" (§ 3518(e)), the Legislature was referring only to regulatory "objectives," and not regulatory "methods."<sup>7</sup> The phrase "policies and programs" is most naturally read to include both "objectives" and "methods." And once past that ineffectual effort to cut all meaning out of the PRA's limitations on OMB's authority, the Government offers nothing to demonstrate that the decision below is wrong in this regard.

No such demonstration could be made. The OSH Act not only gives OSHA, rather than OMB, the authority to

<sup>7</sup> The only decision cited in the Government's petition as mentioning § 3518(e)—and as far as we are aware, the only decision other than this one to discuss any aspect of that provision—is *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *petition for cert. pending* (No. 88-849). *See* Pet. at 28. And that case held only that § 3518(e) does not "completely exempt any civil rights activity from OMB's data collection supervision." *Id.* at 1454-55.

The Government cites no other case construing § 3504(a), and as far as we are aware there is no such case.

promulgate occupational safety and health standards,<sup>8</sup> but also specifies in no uncertain terms the manner in which OSHA is to resolve the tension between costs and employee protection in fashioning standards regarding toxic materials and harmful physical agents, and, in particular, in fashioning hazard communication requirements. OMB's action here plainly transgressed those statutory mandates.

As this Court held in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) ("ATMI"):

[Section] 6(b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then . . . , Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard . . . that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5).

And, insofar as hazard communication is concerned, a second provision of the OSH Act, § 6(b)(7), further requires that standards "*shall prescribe* the use of labels or other appropriate forms of warning as are necessary to *insure* that employees are apprised of *all hazards* to which they are exposed, relevant symptoms and appro-

<sup>8</sup> Congress made a considered judgment that the authority to determine the content of occupational safety and health standards should be entrusted to the Secretary of Labor. This was the approach adopted in the bill passed by the Senate. The House bill, on the other hand, called for an independent board to set standards. "The question of the separate standards board was the most controversial issue confronting the Conference Committee; ultimately, the House of Representatives receded and the Senate approach, giving the Secretary of Labor authority to issue occupational safety and health standards, subject to review in the U.S. courts of appeals, was adopted." B. Mintz, *OSHA: History, Law, and Policy* 25-26 (1984).

prate emergency treatment, and *proper conditions and precautions of safe use or exposure.*" 29 U.S.C. § 655 (b)(7) (emphasis added).<sup>9</sup>

To put it mildly, there is no indication that OMB sought to adhere to the mandate of § 6(b)(5) that standards must provide the greatest level of protection that is "capable of being done," *ATMI*, *supra*, 452 U.S. at 509, or the mandate of § 6(b)(7) that hazard communication mechanisms must "insure" that employees are apprised of "all hazards" and of "proper conditions and precautions of safe use or exposure." Instead, OMB's chief preoccupation was with industry claims of burden or inconvenience, even at the mundane level of, *e.g.*, the need to obtain file cabinets, *see supra* at 6-7, and with a fetishistic desire to ensure that employers be subject to the requirements promulgated by only one regulatory agency, even where the requirements of that agency do not purport to protect *employees*, *see supra* at 7.

Although this point holds true with respect to OMB's disapproval of each of the three regulatory provisions at issue, it is perhaps most obvious with respect to the coverage of consumer products. OSHA's analysis of OMB's comments on this subject, together with the record evidence, establish that OMB is simply wrong in assuming that the labels prescribed by the Consumer Product Safety Commission provide the kind of information that *employees* need if they are to use a product safely *in industrial settings* and *at industrial levels of exposure*. *See supra* at 9. In particular, to use the words of § 6(b)(7) itself, CPSC labels do not provide information as to "proper conditions and precautions of safe use or exposure" in the industrial setting. *See* 53

<sup>9</sup> The final sentence of § 6(b)(7) also directs OSHA to consult on such matters with "the Secretary of Health and Human Services" (*i.e.*, the National Institute for Occupational Safety and Health, an expert scientific body created by the OSH Act within the Department of Health and Human Services, *see* 29 U.S.C. §§ 669(e), 671). The statute does not provide for any such consultation with OMB.

Fed. Reg. 29834, 29835. OSHA's treatment of consumer products was carefully tailored to address this reality. *See supra* at 6, 9. Yet OMB, with hardly a backward glance, ordered OSHA to exempt from the HCS every "substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. at 36a (emphasis added). It cannot seriously be maintained that this approach is consistent with §§ 6(b)(5) and (7).

Thus, even if the Government were correct that the provisions of the HCS at issue constitute "information collection requests," the Third Circuit's conclusion that OMB's disapproval of those provisions was invalid would be unaffected, because, on the facts of this case, OMB's action improperly interfered with OSHA's "substantive policies and programs" (§ 3518(e)), and was "[in]consistent with applicable law" (§ 3504(a)) as embodied in §§ 6(b)(5) and (7) of the OSH Act.

(c) The Government's main complaint with the decision below is that OMB's authority to review "information collection requests" encompasses not only regulations that require the provision of information to a *government agency*, but also regulations that require the provision of information *solely to private parties*. *See* Pet. at i, 17-19, 22-24, 27-28. But even assuming that to be so, two of the three provisions of the HCS at issue here, and part of the third, are outside the PRA's scope because the provisions do not require the regulated employers to provide any information at all. As the Third Circuit emphasized, these provisions essentially require employers "not to *compile*, but simply to *transmit* information." Pet. App. at 9a (emphasis added).

Thus, the provision regarding multi-employer work-sites requires employers to make available to each other the MSDSs the employers have received from chemical manufacturers and importers, and OMB did *not* question the requirements concerning the preparation of MSDSs imposed on manufacturers and importers. The provision

regarding drugs was disapproved only with respect to the non-manufacturing sector, and the HCS does not require employers in that sector to develop information, but only to retain the MSDSs and labels prepared by chemical manufacturers and importers.<sup>10</sup>

The question whether these provisions constitute "information collection requests" within the meaning of the PRA therefore reduces to whether the PRA applies to regulations that merely require a party to *transmit* information *prepared by another*. The Government's petition, however, does not identify this exceedingly narrow technical point of dispute as a Question Presented, *see* Pet. at i, and the petition addresses the matter only in a cryptic footnote which quibbles with the Third Circuit's characterization of the Standard's provisions. *See* Pet. at 22-23, n.11.<sup>11</sup>

The reason for this becoming reticence is that the Third Circuit is plainly correct in recognizing that the PRA does not encompass mere transmittal requirements. OMB itself has stated that "[an] agency's 'obtaining or soliciting of facts or opinions' from the public is the keystone of the definition of 'collection of information.' Some disclosure requirements do not involve any such action." 48 Fed. Reg. 13675 (1983). In OMB's words, "disclosure and labeling requirements are covered [by the PRA]

<sup>10</sup> Of the three provisions at issue, then, only the provision relating to consumer products involves any requirement relating to the development of information, and then only because OMB disapproved the application of the HCS to consumer products altogether, thus eliminating the obligation of chemical manufacturers and importers to prepare MSDSs and labels for such products. Even there, OMB overreached in striking down the Standard's *training* requirement—which is plainly outside the PRA's scope—insofar as that requirement applies to consumer products.

<sup>11</sup> The Government states, for example, that the multi-employer worksite provision "requires employers to gather and keep records at a specific site." *Id.* This begs the question, because the point is that the records to which the Government refers are MSDSs *prepared by others*.

only to the extent that they implicitly or explicitly require a person to collect information for the purpose of the disclosure or labeling." *Id.* Thus, for example, OMB has acknowledged that the requirement of placing warning labels on cigarette packages does not constitute a collection of information because the persons subject to the requirement do not have to develop the information contained in the warnings, but "need only transmit to the public" information provided by another (in that case, the federal Government). *Id.*

Because the provisions at issue here, with one limited exception, require only transmittal of information prepared by others, those provisions would not constitute "information collection requests" even if the Government were correct in its position on the only question its petition asks this Court to address.

2. Our showing to this point is that the question the Government seeks to present—*viz.*, whether the PRA applies to information developed solely for use by private parties, rather than for use by a government agency—is not significant to the proper resolution of even this highly unusual case. We now show that putting that consideration aside the petition should be denied because the Government's position on its question presented is wrong.<sup>12</sup>

<sup>12</sup> We note in passing that there is no conflict in the circuits on this question. The Government's petition cites one decision, *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *pet. for cert. pending* (No. 88-849), which is contended to be "at odds" with the present decision, albeit "not in square conflict," since *Action Alliance* arose under the Federal Reports Act, not the PRA, *Pet.* at 27-28. But the petition's candor does not go far enough: as the Third Circuit demonstrated, *Pet. App.* at 9a, the two decisions are not even "at odds." *Action Alliance* involved information required to be collected for the potential use of the Government, *see* 846 F.2d at 1452, 1453, and the D.C. Circuit held only that the PRA is applicable to such an information collection request even where the information has not actually been delivered to the Government. *Id.* at 1453-54. But the Standard here requires information to be developed and provided solely

The language of the PRA strongly supports the proposition that the statute applies only to information collected for governmental use. "Practical utility," the criterion that guides OMB's determination whether to approve agency rulemaking, *see* 44 U.S.C. § 3508, is defined in the Act as "*the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion.*" § 3502(16) (emphasis added).<sup>13</sup> On the other side of the coin, the "burden" of paperwork requirements, which the PRA is intended to "minimize," § 3501(1), is defined as "*the time, effort, or financial resources expended by persons to provide information to a Federal agency*" § 3502(3) (emphasis added). In addition, 44 U.S.C. § 3512, which spells out the consequence of OMB's failure to approve an information collection request, provides that in the absence of such approval "no person shall be subject to any penalty for failing to maintain or provide information to any agency" (emphasis added). And the Senate Report accompanying the legislation gives numerous examples of "federal paperwork requirements," every

for use by employees, not for use by the Government, and as we show in text that is a decisive difference.

We also note that the regulations erroneously described by the Government as "substantially identical" to the HCS, *Pet.* at 18, all require the development and compilation of information, not merely the transmittal of information prepared by others. The same is true of the disclosure requirements discussed in the legislative history cited in the Petition at 25-26.

<sup>13</sup> Under the Act, consideration of "practical utility," as so defined, is part of the determination "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency. . . ." 44 U.S.C. § 3508 (emphasis added). Thus, the PRA applies only to information collected for use by an agency in the performance of its functions, as distinguished from information which serves to effectuate federal law or policy in some other way. The information generated by the HCS to be provided to employees certainly serves to effectuate the policies of the OSH Act, but the information is *not* used by OSHA for the "performance of [the Agency's] functions."

one of which involves provision of information to the Government. S. Rep. No. 930, 96th Cong., 2d Sess. 3-4 (1980).<sup>14</sup>

The Government's petition emphasizes that OMB has published a regulation proclaiming that OMB has authority to review and disapprove agency requirements "that a person 'provide information to another person.'" Pet. at 22, quoting 5 C.F.R. § 1320.7(s). It remains the law, however, that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977) (footnote omitted). OMB's views on this subject are certainly not entitled to the fullest measure of deference.<sup>15</sup> "An agency may not finally decide the limits of its statutory power," *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), and that point applies with special force in this case, where the provision upon which OMB relies, and which OMB promulgated, serves to aggrandize OMB's own jurisdiction and authority.

<sup>14</sup> None of the legislative history cited by the Government (Pet. at 25-27) or ABC (Pet. at 19) is to the contrary. For example, in discussing SEC disclosure requirements the Senate Report cited by the Government describes the objects of those requirements as "documents filed with the Securities and Exchange Commission by issuers of securities . . .," and the Report states in that connection that the statutory concept of "practical utility" turns on "*whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public. . .*" S. Rep. No. 930, *supra*, at 39-40 (emphasis added), quoted in the Government's petition at 26. Thus the discussion of public disclosure in the Report refers to disclosure *by an agency* of documents filed with it.

<sup>15</sup> As the statutory provisions cited above indicate, this is not a case where Congress "did not have a specific intention on [the question presented]," *Chevron U.S.C. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984), and left a "gap" for OMB to fill, *id.* at 843, quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

## CONCLUSION

For the reasons stated, -the petitions for certiorari should be denied.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

**ELIZABETH DOLE, SECRETARY OF LABOR,**  
*et al., Petitioners,*

v.

**UNITED STEELWORKERS OF AMERICA,**  
*et al., Respondents.*

**RESPONDENT PUBLIC CITIZEN'S OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

Contrary to petitioners' claim, this case presents two distinct questions for review. The only question on which petitioners seek review, Question 2 below (as restated by respondent), can be reached only if the Court resolves Question 1 in petitioners' favor:

1. May a federal agency, which is subject to a final court order directing it to complete rulemaking by a date certain, rely on the Paperwork Reduction Act to disobey that order by withdrawing provisions of the final rule after the expiration of the court-imposed deadline?

2. Does the Paperwork Reduction Act permit the Office of Management and Budget to override the substantive judgment of an Executive Branch agency made during a rulemaking proceeding that employers must provide their workers with information about work-place hazards, where such information will never be submitted to any federal agency?

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IN THE  
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**RESPONDENT PUBLIC CITIZEN'S OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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Respondent Public Citizen submits this opposition to supplement in two respects the more comprehensive opposition filed by respondents United Steelworkers of America, AFL-CIO, and the Building and Construction Trades Department, AFL-CIO ("Steelworkers") which Public Citizen supports in full.

First, respondent demonstrates that the question on which petitioners seek review cannot be reached unless this Court rules that the authority of federal courts to set a deadline for agency action is limited by the Paperwork Reduction Act of 1980 ("PRA"). 44 U.S.C. §§ 3501 *et seq.* Second, we address the flaws in petitioners' contention that the ruling below significantly impairs the power of the Office of Management and Budget ("OMB") to review agency information collection and dissemination requirements.\*

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\* Respondent Public Citizen adopts in full the opposition filed by the Steelworkers in *Associated General Contractors of America v. OSHA*, No. 88-1070, *Associated Builders & Contractors v. OSHA*, No. 88-1075, and *National Grain and Feed Ass'n v. OSHA*, No. 88-1385, and will not file a separate opposition to those petitions.

1. Petitioners are incorrect in suggesting that their petition presents only a single question for review. Petitioners acknowledge that the "question presented . . . arises in the context of a contempt action against the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health." Pet. at I. But they never address the impact of the contempt proceeding on their petition.

Yet it is precisely because this case arises in the context of a contempt action that the petition does not cleanly present the question on which petitioners seek certiorari. In determining that OMB's assertion of authority was improper in this case, the Third Circuit explicitly rested its judgment on two entirely separate grounds: its reading of the information collection provisions of the PRA *and* its finding that petitioners had violated the court's prior orders by withdrawing parts of the revised Hazard Communication Standard ("HCS") *after* the sixty-day deadline had elapsed. Pet. App. at 12a-13a. Thus, as an independent and alternative basis for its judgment, the Third Circuit held (*id.*) that the "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with" the court's prior orders, and, for that reason, "relief by motion is appropriate" under the All Writs Act, 28 U.S.C. § 1651(a), and the Administrative Procedure Act, which empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Although petitioners have ignored this alternative ground for the court's judgment, it plainly erects a major obstacle to review of the question on which petitioners seek certiorari. In order to address the statutory question under the PRA, this Court will first have to resolve the more fundamental question: may a federal agency, which is subject to a final court order directing it to complete rulemaking by a date certain, rely on the Paperwork Reduction Act to disobey that order by withdrawing provisions of the final rule after the expiration of the

court-imposed deadline?

Thus, to reach the statutory question presented by petitioners, the Court would first have to conclude that the PRA limits the authority of federal courts to set final deadlines for agency action. But the PRA itself dictates the opposite result. It provides that OMB's authority under the PRA "shall be exercised consistent with applicable law," 44 U.S.C. § 3504(a), which presumably includes rulings and orders issued by federal judges. Moreover, although courts are generally hesitant to impose fixed deadlines on agencies, *e.g.*, *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983); *Oil, Chemical & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487 (D.C. Cir. 1985), they have done so in egregious cases like this one. *See, e.g.*, *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 633 (D.C. Cir.), *vacated as moot*, 817 F.2d 890 (1987). As the D.C. Circuit recently observed, "[a]t some point, we must [be able to] lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987). Unless this Court is prepared to rule that the PRA somehow overrides a federal court's power to "let an agency know" when "enough is enough" by setting a final, enforceable deadline for agency action, then the question on which petitioners seek review cannot determine the outcome of this case.

Finally, if the PRA creates the kinds of rights and obligations asserted by petitioners, the time and place for petitioners to have raised the question of OMB review under the PRA was when the Third Circuit issued its August 24, 1987 ruling setting a sixty-day deadline, so that, at the very least, the court could have taken the PRA into account in both the substance of its order and in fashioning the deadline that it set. But petitioners did no such thing; nor did they seek this Court's review. In short, it is too late to claim that the PRA has such a sweeping role, particularly given the PRA's own built-in limitation that it must be exercised

in a manner that is consistent with other laws, such as the Occupational Safety and Health Act, the Administrative Procedure Act, and the orders of federal courts. *See* 44 U.S.C. § 3504(a).

2. As the Steelworkers' Opposition explains, the Third Circuit's interpretation of the Paperwork Reduction Act is correct, and there is no reason why the Court should review it. There is, however, one additional factor that weighs heavily against review.

Despite the statistics cited by petitioners regarding the seemingly ubiquitous information collection requirements that the federal government imposes on Americans, *see* Pet. at 17-18, insofar as respondent is aware, this case is the first ever to interpret the information collection provisions of the PRA. 44 U.S.C. § 3504(c)(1) and (2). Petitioners nowhere explain why there has been such a dearth of litigation over such a pervasive and intrusive federal requirement. The answer, however, is important in understanding the flaws in petitioners' arguments about the need for this Court's intervention.

Petitioners' principal argument in favor of review is that the decision below will "effectively invalidate OMB's authority to review a wide range of other essentially indistinguishable agency information collection activities." Pet. at 17. This argument is specious. Contrary to the petitioners' suggestion, OMB's power under the PRA cannot be examined in isolation. Entirely aside from OMB's responsibilities under the PRA, OMB has sweeping authority under Executive Orders 12,291 and 12,498 to supervise comprehensively the development of any regulatory action that imposes a paperwork requirement — authority wholly unaffected by the Third Circuit's ruling.

Had this case not arisen in the context of a contempt proceeding, where petitioners were required by a valid court order to complete rulemaking within sixty days, OMB would have had ample opportunity to target what it believed to be the offending

provisions of the revised HCS under either or both Executive Orders. In the ordinary case, OMB would have raised its objections well before the publication of a proposed regulation — which is when OMB's responsibilities under the PRA first arise. *See* 44 U.S.C. § 3504(h). But this is an extraordinary case. As a result of the Secretary of Labor's egregious delay and the Third Circuit's order requiring the issuance of a final rule within sixty days, OMB had little opportunity to review the agency's rule under the Executive Orders. Nor could OMB exercise its powers under PRA to disapprove provisions of the agency's rule *after* the sixty day deadline imposed by the court had elapsed. Thus, the ruling below is the product of a highly unusual confluence of events and will have little or no impact on either OMB's ability to review agency actions affecting paperwork collection or dissemination, or subsequent litigation.

As a general rule, OMB's first review takes place when the agency's regulatory action is still inchoate. Thus, under Executive Order 12,498, all executive branch agencies — including the Department of Labor — must secure OMB's approval before they may place any regulatory initiative, including those involving information collection or dissemination, on its "regulatory agenda". 50 Fed. Reg. 1036 (1985), *reprinted as note to* 5 U.S.C.A. § 601, at 296 (Supp. 1988). In reviewing an agency's proposed regulatory program, OMB considers whether the agency's program is "consistent with the Administration's regulatory principles," § 2(b), and in keeping with "the regulatory principles stated in Section 2 of Executive Order 12291," § 3(d), which, as discussed more fully below, require an agency to justify its regulatory actions under strict cost/benefit criteria. If OMB determines that any part of the agency's draft regulatory program does not pass muster, the agency has the option of either revising it to meet OMB's objections, or invoking the procedure set forth in § 3(a)(ii), which provides for review "by the President or by such appropriate Cabinet Council or other forum as the

President may designate."

OMB's regulatory review function does not end once it allows an agency to start down the rulemaking path. Executive Order 12,291 was issued by President Reagan "in order to reduce the burdens of existing and future regulations" and "minimize duplication and conflict of regulations, and insure well-reasoned regulations." 46 Fed. Reg. 12193 (1981), 3 C.F.R. § 127 (1981), *reprinted as note to 5 U.S.C.A. § 601, at 292 (Supp. 1988)*. The Order directs OMB to review an agency's rulemaking efforts, including those relating to information collection and dissemination, on at least two other occasions: first, when the agency is ready to publish a notice of proposed rulemaking, and second, when the agency is ready to publish its final rule. In conducting this review, OMB's mission is to ensure consistency with the principles articulated in the Order, including the requirements that:

- (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
- (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulations outweigh the potential costs to society;
- (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
- (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; . . .

Executive Order 12,291, §§ 2(a)-(d). Moreover, for all "major rules," like the revised HCS, agencies are required to prepare and

submit for OMB's review a Regulatory Impact Analysis, in which the agency justifies the regulation on cost/benefit grounds and describes "alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of the potential benefits and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted." §§ 3(c)(3)(d)(2)-(5).

Following its review, OMB can either approve the regulation or require the agency to respond to the concerns that it has identified. However, an agency is not permitted to publish any proposed or final rule until it satisfactorily responds to all of the objections raised by OMB, § 3(f)(2), which gives OMB considerable power to press agencies to modify any regulatory action that is, in OMB's view, incompatible with the requirements of the Order.

The Third Circuit's ruling will have no impact on OMB's plenary authority under Executive Orders 12,291 and 12,498 to review any information collection and dissemination activities imposed by an Executive Branch agency. Thus, OMB's basic objection to OSHA's decision to apply the revised HCS to multi-employer worksites was that it "does not appear to be the least burdensome [way] necessary for the efficient transmittal of hazard information . . ." Pet. App. 32a; *see also* Pet. at 14. But in the normal course, OMB would have raised this precise objection under the Executive Orders long before its responsibilities under the PRA were triggered, since OSHA's rule is, in OMB's view, incompatible with the cost/benefit criteria articulated in Executive Order 12,291, § 2, *see also* Executive Order 12,498, § 3(3)(d) (incorporating the standards set forth in § 2 of Executive Order 12,291 by reference), and at odds with OSHA's duty to explore less costly alternatives, as required by Executive Order 12,291, § 3(c)(3)(d)(4).

As is evident, this case does not present the grave situation depicted by petitioners. OMB has a broad array of powers under

which it supervises and controls every facet of an Executive Branch agency's exercise of authority, including those involving information collection and dissemination, regardless of whether the Third Circuit's construction of the PRA is allowed to stand. Accordingly, review by this Court is not warranted.

### CONCLUSION

For the reasons stated above, and in the separate opposition filed by the Steelworkers, this Court should deny the petition for a writ of certiorari.

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April 3, 1989

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No. 88-1434

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.  
CLERK

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1988

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**ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS**

**v.**

**UNITED STEELWORKERS OF AMERICA, ET AL.**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**REPLY MEMORANDUM FOR PETITIONERS**

---

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9/2/89

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS

v.

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*ON PETITION FOR A WRIT OF CERTIORARI  
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**REPLY MEMORANDUM FOR PETITIONERS**

---

The question presented in this case is whether the Office of Management and Budget's (OMB's) review of agency information collection activities, conducted pursuant to the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, applies to the Department of Labor's hazard communication standard. As our petition explains, this Court's review is warranted because: (1) the court of appeals' decision, which would nullify OMB's authority to examine a wide range of essentially indistinguishable agency activities, poses an important question (Pet. 17-19); (2) the court's decision is incorrect (*id.* at 19-27); and, (3) the court's reasoning is inconsistent with another court of appeals' decision addressing OMB's responsibilities under the PRA's predecessor statute (*id.* at 27-28). In short, this case presents a textbook example of the type of question that warrants this Court's review. Neither the United Steel-

workers' uncommonly derisive brief in opposition (USWA Opp.), nor Public Citizen's supplemental submission (P.C. Opp.), presents any persuasive ground for denying our petition.

1. Respondents first contend that this case does not warrant review because it arises from an "idiosyncratic proceeding" (USWA Opp. 11) in which respondents convinced the court of appeals to manage, under threat of contempt sanctions, the Secretary of Labor's promulgation of a hazard communication standard. We agree that the court of appeals' actions in this case are "idiosyncratic," but that fact strengthens, rather than diminishes, the need for this Court's review. The court of appeals' decision, which threatens a Cabinet officer with contempt sanctions for *complying* with OMB regulations, is the type of departure "from the accepted and usual course of judicial proceedings" that argues in favor of, rather than against, the grant of a petition for a writ of certiorari. See Sup. Ct. R. 17.1(a).<sup>1</sup>

Respondents mistakenly contend that the court of appeals' decision here rests "*primarily*" on the court's construction of its own prior orders and "*only secondarily*" on the court's "views concerning OMB's authority under the PRA" (USWA Opp. 11 (emphasis in original)). See also P.C. Opp. 2-4. Contrary to respondents' arguments, these are not "alternative" (USWA Opp. 11) or "entirely

<sup>1</sup> Public Citizen also contends (P.C. Opp. 4-8) that there is no need for this Court to correct the court of appeals' erroneous construction of the PRA because OMB may be able to accomplish the PRA's objectives through other non-statutory means. Public Citizen is simply taking issue with Congress's judgment that the PRA's *mandatory* requirements are necessary to reduce the public's paperwork burdens. In any event, Public Citizen's assertion that OMB's other powers provide appropriate alternatives to PRA review is not accurate.

separate" (P.C. Opp. 2) grounds. The court ruled that the Secretary of Labor had violated its prior orders because she withdrew portions of the newly promulgated hazard communication standard *in response to* OMB's "attempt to exceed its statutory authority" (Pet. App. 13a). Thus, the court's conclusion that the Secretary had violated the prior orders was *based on* the court's construction of the PRA. Indeed, if, as respondents suggest, the court had intended to rescind the Secretary's withdrawal *regardless* of whether it believed that OMB acted within its authority—a truly extraordinary result even in this "idiosyncratic" case—the court would have had no need to discuss OMB's authority at all.

Respondents further contend that the question involved here will not arise in the future because OMB normally conducts its review before the agency promulgates a final rule, the agency then has an opportunity to respond, and OMB may disapprove the final rule "if [OMB] finds \* \* \* that the agency's response to [its] comments \* \* \* was unreasonable" (44 U.S.C. 3504(h)(5)(C)). See USWA Opp. 11-12. Respondents assert that since this process permits the reconciliation of any disagreement between the agency and OMB, "[i]n the ordinary situation, then, the provisions of the PRA itself would have prevented the OMB/OSHA clash that gave rise to a need for a judicial resolution" (*id.* at 12).<sup>2</sup> Respondents fail to recognize, however, that the court of appeals' decision invalidated OMB's authority to take even the very *first* step of the PRA process—the court held that OMB had no authority to review the disapproved provisions. If OMB has no

<sup>2</sup> In this case, the rulemaking did not proceed along the "normal course" (USWA Opp. 11) because *respondents* convinced the court of appeals to order the immediate promulgation of a final rule. See Pet. 11-13.

authority to review agency regulations such as those presented here, then the subsequent steps are irrelevant. Respondents' argument simply underscores one of the reasons why this Court's review is warranted. Moreover, respondents' prediction that this issue will not arise in the future is unrealistic.<sup>3</sup> Indeed, the District of Columbia Circuit reached an inconsistent result in *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (1988), under the PRA's predecessor statute, and a petition for a writ of certiorari is presently pending before this Court in that case (No. 88-849). See Pet. 27-28.<sup>4</sup>

2. Respondents defend the court of appeals' conclusion that OMB had no authority to review the disapproved portions of the hazard communication standard because the provisions do not involve "information collection requests" (USWA Opp. 16-18 & n.9). Respondents contend, even more emphatically than the court of appeals, that the provisions "essentially require employers 'not to compile, but simply to transmit information'" (*id.* at 16, quoting Pet. App. 9a (emphasis added by respondents)). As our petition explains (at 22-23 n.11), that distinction is inaccurate. It is also beside the point. The PRA and OMB's regulations define an "information collection request" to include, inter alia, a "reporting or recordkeeping require-

<sup>3</sup> Even in the "normal course" of rulemaking, OMB may disapprove all or part of a final rule if it concludes that the agency's response to OMB's objections is unreasonable or if the final rule contains objectionable new requirements. See 44 U.S.C. 3504(h)(5). Thus, the prospect of interagency reconciliation would not necessarily prevent recurrence of the issue presented here.

<sup>4</sup> As we explained in our petition (at 19, 28), the court of appeals' novel decision in this case will undoubtedly encourage parties to challenge OMB's authority in other nationwide rulemakings since parties can raise such challenges in the federal circuit of their choice — and may therefore direct future cases to the Third Circuit.

ment" (44 U.S.C. 3502(11) (1982 & Supp. IV 1986); see 5 C.F.R. 1320.7(c), (r) and (s)), and all three disapproved provisions impose, inter alia, recordkeeping and reporting requirements. See Pet. 22-24. Those provisions were therefore subject to PRA review.<sup>5</sup>

3. Although the court of appeals devoted most of its discussion to whether the disapproved provisions of the hazard communication standard are "collection of information" requirements subject to PRA review (Pet. App. 8a-11a), respondents defend the court's decision primarily on an alternative ground, cited by the court of appeals as having "reinforced" (*id.* at 11a) its conclusion. Respondents contend (USWA Opp. 13) that the PRA provisions stating that OMB shall exercise its authority "consistent with applicable law" (44 U.S.C. 3504(a) (1982 & Supp. IV 1986)) and that the PRA shall not "be interpreted as increasing or decreasing the authority of \* \* \* [OMB] \* \* \* with respect to the substantive policies and programs of departments, agencies and offices" (44 U.S.C. 3518(e)) prohibit OMB from disapproving the Labor Department's hazard communication standard.<sup>6</sup>

<sup>5</sup> Respondents, like the court of appeals, do not even acknowledge OMB's regulations on this subject. Respondents incorrectly suggest that OMB has taken the position that "the PRA does not encompass mere transmittal requirements" (USWA Opp. 17-18). OMB regulations expressly provide for review of agency regulations requiring persons "to obtain or compile information for the purpose of disclosure to members of the public" (5 C.F.R. 1320.7(c)(2)). OMB's regulations further specify that "public disclosure of information *originally supplied by the Federal government* to the recipient for the purpose of disclosure to the public is not included within this definition" (*ibid.* (emphasis added)). But that exception does not apply in this case, where the information originates from a chemical manufacturer or the employer.

<sup>6</sup> Public Citizen, which argues that OMB already has ample authority to accomplish the PRA's objectives under other "applicable law" (see P.C. Opp. 4-8), presumably disagrees with this argument.

OMB's disapproval in this case, which required the Department of Labor to provide either a less burdensome means of accomplishing its substantive objectives or a reasonable explanation why the disapproved provisions should be retained, is consistent with all applicable law. Although respondents contend that OMB has infringed the Department of Labor's statutory authority (USWA Opp. 14-16), the Department has always acknowledged that the hazard communication standard is subject to PRA review. Furthermore, as we explained in our petition (at 24-25), the PRA is quite explicit in allowing OMB to review the kinds of information collection activities that an agency chooses to adopt to accomplish its "substantive" policies. Indeed, respondents' contention that OMB lacks authority to review the agency's "'objectives' and 'methods'" (USWA Opp. 13 (emphasis in original)) would significantly drain the PRA of any meaning. Under respondents' theory, OMB would have no authority to engage in meaningful PRA review of *any* information collection request. For example, respondents' theory *might* permit OMB to review the color or typeface of the Internal Revenue Service's income tax return forms, but OMB could no longer examine whether the IRS's reporting and recordkeeping requirements are "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). Respondents' position, which is manifestly inconsistent with the PRA's language and objectives, simply highlights the need for this Court's review.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1989

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,  
AND THE ASSOCIATED GENERAL CONTRACTORS  
OF VIRGINIA,

*Petitioners,*  
v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, *et al.*,  
*Respondents.*

[Captions Continued on Inside Cover]

On Petitions for Writs of Certiorari to the  
United States Court of Appeals for the Third Circuit

**BRIEF OF THE NATIONAL ASSOCIATION OF  
MANUFACTURERS AS AMICUS CURIAE IN SUPPORT  
OF PETITIONS FOR WRITS OF CERTIORARI**

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ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the  
CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,

v. *Petitioners,*

THE OCCUPATIONAL SAFETY AND HEALTH  
ADMINISTRATION, UNITED STATES  
DEPARTMENT OF LABOR, *et al.*,  
*Respondents.*

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THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,  
and UNITED TECHNOLOGIES CORP.,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondent.*

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ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-1070

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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,  
AND THE ASSOCIATED GENERAL CONTRACTORS  
OF VIRGINIA,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, *et al.,*  
*Respondents.*

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No. 88-1075

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ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the  
CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,

v. *Petitioners,*

THE OCCUPATIONAL SAFETY AND HEALTH  
ADMINISTRATION, UNITED STATES  
DEPARTMENT OF LABOR, *et al.,*  
*Respondents.*

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No. 88-1385

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THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,  
and UNITED TECHNOLOGIES CORP.,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR,  
*Respondent.*

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*  
 v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

On Petitions for Writs of Certiorari to the  
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**BRIEF OF THE NATIONAL ASSOCIATION OF  
 MANUFACTURERS AS AMICUS CURIAE IN SUPPORT  
 OF PETITIONS FOR WRITS OF CERTIORARI**

**INTEREST OF THE AMICUS CURIAE**

The National Association of Manufacturers of the United States of America ("NAM") is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is associated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Most of the NAM member companies are heavily regulated in many areas of their activities, at substantial expense to the member companies and to the consumers of their manufactured products. A significant portion of the expense is associated with a broad array of federal requirements to create, disseminate and keep records. Most of the regulation and recordkeeping requirements are not directly imposed on NAM members by statute; they are imposed principally by agency rules.

The members of NAM have been covered by a Hazard Communication Standard ("HCS") since 1983, and are not directly affected by the adoption of an HCS for non-manufacturers. However, the members of NAM are vitally affected by the Third Circuit's decisions undermining the procedural safeguards contained in the requirements of the Administrative Procedure Act ("APA") and the Occupational Safety and Health Act ("OSH Act") that agency rules only be adopted after notice and opportunity to comment. Likewise, NAM's members are adversely affected by the Third Circuit's restrictive interpretation of the Paperwork Reduction Act of 1980, a law which has benefited the productivity of American manufacturers by ameliorating the burdens of federally sponsored paperwork.

NAM therefore submits this brief as *amicus curiae*, with the consent of all parties, in support of the Petitions for Writs of Certiorari in order to assist the Court in evaluating the importance of the issues presented.

**PRELIMINARY STATEMENT**

These cases bring before the Court two major issues affecting the functioning of all federal administrative agencies. The first issue is whether the notice and opportunity to comment on a proposed HCS for manufacturers was sufficient under the APA and the OSH Act for the adoption of a final HCS for non-manufacturers. The second issue is the scope of the authority of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1980 to reduce paperwork requirements imposed by the Occupational Health and Safety Administration ("OSHA"). Petitioners seeks writs of certiorari in connection with two cases decided by the Third Circuit. *Associated Builders and Contractors, Inc. v. Brook*, No. 88-1075 (3d Cir., Nov. 25, 1988) (a consolidation of four petitions for review of administrative action), and *United Steelworkers of Am. v. Pendergrass* (USWA III), 855 F.2d 108 (3d Cir. 1988).

## REASONS FOR GRANTING THE PETITION

### I. THE THIRD CIRCUIT HAS REDUCED THE MINIMUM PROCEDURAL STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT BELOW THE PARAMETERS ESTABLISHED BY CONGRESS AND THE SUPREME COURT. THIS REDUCTION WORKS A SUBSTANTIAL HARDSHIP ON INDIVIDUALS AND ORGANIZATIONS THAT PARTICIPATE IN REGULATORY MATTERS AND DIMINISHES THE QUALITY OF RULEMAKING.

The United States Court of Appeals for the Third Circuit violated the APA and the OSH Act in adopting an HCS for non-manufacturers without permitting OSHA to provide non-manufacturers with notice and an opportunity for comment beyond that afforded by the original notice applying an HCS to manufacturers in 1982. 42 Fed. Reg. 12,092 (1982). Insofar as that court's action is seen as allowing rulemaking without notice and comment, the decision is a novel departure from settled law<sup>1</sup>, is at odds with other Circuits<sup>2</sup>, works a substantial hardship on individuals and organizations who participate in regulatory matters, disserves the government agency seeking the views of the affected public, and is deserving of reversal by this Court.

<sup>1</sup> See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981) (OSHA must show each specific provision of safety standard contributed to increased safety); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 667 (1980) (plurality invalidated OSHA's benzene standard because of failure to explain how rule would benefit workers).

<sup>2</sup> See, e.g., *AFL-CIO v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

### A. This Court Should Resolve The Question of What Degree of Change Between Proposed and Final Rulemakings Triggers a Requirement For a New Proposal.

Both the APA and the OSH Act require OSHA to provide notice and opportunity for comment on proposed regulations before they become final. 5 U.S.C. § 553(b) (1982) and 29 U.S.C. § 655(b) (1982). Under order of the Third Circuit, OSHA published no proposed regulations on the application of an HCS to the non-manufacturer employers.

The Third Circuit justified its order prohibiting further notice by relying on its earlier decision in *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) and similar decisions in the United States Court of Appeals for the District of Columbia. See *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). Those lower court decisions established that a final rule may differ from the proposed rule where the change is a "logical outgrowth" of the rulemaking proceeding. 647 F.2d at 1221; *NRDC v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987) (stating that substantial changes can be made "as long as the final changes are in 'character with the original scheme' and 'a logical outgrowth' of the notice and comment.")

The proper scope of this "logical outgrowth" concept is an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U.S.C. § 553, or similar provisions in new Acts of Congress for review of agency action.

*Eli Lilly & Co. v. Costle*, 444 U.S. 1096, 1096 (1980) (Rehnquist, J. dissenting on denial of petition for writ of certiorari). Chief Justice Rehnquist's statement is

prophetic: the issue has continued to grow in importance, lacking needed guidance from the Supreme Court. The Court should review this case to resolve the critical question of how much change in a proposed rule is permissible without a reproposal before final promulgation.

The application of a standard to an entirely new group of industries cannot be deemed a "logical outgrowth" of a proposed rule which did not previously affect those industries. The impacts of an HCS on the construction and agricultural communities differ significantly from the impacts on the manufacturing community initially covered.<sup>3</sup> In addition to qualitative differences between the affected communities, the quantitative change effected by extending the HCS from manufacturers to non-manufacturers eliminates any logic in the growth of the standard without additional notice and opportunity to comment.<sup>4</sup>

<sup>3</sup> The 230% average turnover rate in the construction industry and the outdoor nature of construction work contrast with the "prototypical manufacturing workplace, which is generally a stationary worksite with a relatively stable workforce." Comments of the Associated General Contractors of America, Oct. 23, 1987, attached as Appendix 5 to the Petition for Review of a Final Rule of the Occupational Safety and Health Administration, *Associated Gen. Contractors v. OSHA* (3d Cir.) (No. 88-1070), at 13a.

<sup>4</sup> The August 24, 1987 expanded rule applied an HCS, without notice and opportunity to comment other than that afforded in 1982, to 4,503,879 theretofore uncovered establishments with a total employment of 58,890,236, of which an estimated 18,391,096 employees are exposed in the workplace to hazardous chemicals. 52 Fed. Reg. 31,852, 31,871. OSHA estimated the cost of the application to non-manufacturing employers to be \$687.2 million in the first year, with substantial additional costs each year thereafter. *Id.* at 31,873. Indeed, without the benefit of a notice of proposed rulemaking, OSHA may have seriously underestimated both coverage and cost impact of its new rule. For example, the Association of General Contractors testified before OMB that compliance in the construction industry would require 58 million man hours in the first year with costs for retraining at 38 million man hours for subsequent years. In contrast, OSHA estimated the costs at 34 million and 8 million respectively for all industries.

The final rulemaking extending the HCS to non-manufacturers is not a logical outgrowth of the initial standard and should have triggered a new proposal to allow comment since the non-manufacturers did not have "a fair opportunity to present their views on the contents of the final plan." 824 F.2d at 1283. The error of the Third Circuit in bypassing the APA and OSH Act notice and comment requirements for the entire non-manufacturing sector of the nation's industry provides an important opportunity for the Supreme Court to clarify the standards for re-proposal of proposed regulations.

**B. The Practical Inability of the Public to Follow the Enormous Range of Rulemaking Activities Which May Potentially, But Not Expressly, Affect Them Makes a Clear Standard For Notice and Comment Imperative.**

In addition to the unfairness to the non-manufacturers here, the practical consequences of the Third Circuit's decision for all future rulemakings are worrisome. "Agencies could in the future publish vague, ambiguous notices in the Federal Register, adverting obliquely to certain issues or proceedings, and then, months or years later, promulgate final rules and claim that constructive notice had been given." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978).

In each of the past five years, more than 3,000 proposed rules and 4,500 final rules have appeared in the Federal Register. Office of Management and Budget, Executive Office of the President, *Regulatory Programs of the United States Government, April 1, 1987 to March 31, 1988* 636.

Given this large number of federal rulemakings, those who are regulated and their associations, such as NAM, must limit the proposed rules that receive close attention.

When an agency announces, as OSHA did here,<sup>5</sup> that it will not adopt a standard for a class of the regulated community, members of that class typically pass on to other issues. Under the Third Circuit's rule, those excluded from regulation will nevertheless have to participate in rulemakings in which there is any shadow of an implication in the preamble that they might be included. This will lead to added expense and complexity for private and government parties.

The result for the courts is also worrisome. When an agency promulgates a final rule that excludes a sector of the regulated community and a review petition is filed, the seemingly excluded persons will have no choice but to intervene in the litigation to protect their interests. This will lead to unnecessary court interventions and will make such cases even more complex and burdensome.

Furthermore, the appropriateness, clarity, and efficacy of regulations which have not had the benefit of comments from all those potentially affected will be significantly diminished. "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). OSHA itself recognized the need for notice and comment so that the final regulation could accurately reflect the differences among the groups covered. OSHA stated that the HCS as developed "focused on existing practices and desirable implementation methods in manufacturing industries," and urged the Third Circuit to permit repropounding the regulations before applying them to non-manufacturers. Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Secretary of Labor (No. 83-3554) at 9. The need for a reproposal is evident from the record before OMB. Confusion over issues of coverage, scope and practicality raised by participants at the OMB hearings easily could

<sup>5</sup> 47 Fed. Reg. 12,092, 12,101-12,102 (1982).

have been addressed and clarified through a rulemaking proposal.<sup>6</sup> The Third Circuit decision deprived the agency of the opportunity "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule . . . ." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

### C. The Third Circuit Could Have Instead Imposed Detailed Time Deadlines on OSHA.

Whatever the frustrations of the labor organization petitioners with the pace of achieving their goal, the Third Circuit should not have meddled in agency procedure to speed up agency action.<sup>7</sup> The court could have imposed a reasonable time limit instead. The ability of courts to fashion remedies that achieve results without interfering with the agency's attempt to assure adequate notice and comment is amply demonstrated by the remand issued in *EDF v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (ordering EPA to adhere to a schedule for fulfilling its statutory obligations).

<sup>6</sup> For example, The National Druggist Association raised legitimate questions as to whether capsules which contain powders or liquids were exempt from the rule noting that if they were not, an additional \$3,400,320 in compliance costs would be incurred by druggists. October 16, 1987 hearing before OMB at 174. Similarly, the Small Business Administration testified that OSHA had underestimated the first year cost impact by over one billion dollars. Statement of Charles A. Cadwell, U.S. Small Business Administration before the Office of Management and Budget, Oct. 16, 1987.

<sup>7</sup> The Third Circuit's repeated references to the time intervals between agency actions and court proceedings indicates that the Third Circuit may also have shared in this frustration. See *United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 732 (3d Cir. 1985), and *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263, 1265, 1266, 1269 (3d Cir. 1987).

## II. COURTS SHOULD NOT INTERFERE WITH AGENCY ACTIONS THAT ARE LAWFUL AND REASONABLE. REVIEW IS NEEDED IN ORDER TO MAKE CLEAR THE VITALITY OF THE DOCTRINES EXPRESSED BY THE SUPREME COURT IN *VERMONT YANKEE* AND *CHEVRON*.

The Third Circuit ignored the principles of judicial restraint enunciated in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). *Vermont Yankee* limited the courts' ability to interfere in the procedural actions of agencies. 435 U.S. at 555. The Third Circuit violated this precept in a novel context that needs review by the Supreme Court. *Vermont Yankee* restrained the judiciary from imposing procedural requirements on federal agencies in excess of those required by Congress. In the present case, the Third Circuit interfered with the agency's chosen procedure by imposing procedural requirements less than those required by Congress and selected by the agency.

By compelling OSHA to skip over the procedures required by the APA and the OSH Act, the Third Circuit violated the *Vermont Yankee* principle that courts should not interfere with agency actions permissible under statute. Even assuming *arguendo* that the notice afforded non-manufacturing employers in the 1982 rulemaking was in theory legally sufficient to allow OSHA to go directly to a final rule, under *Vermont Yankee* the Third Circuit should not have ordered the agency to abandon its choice to collect more information and undertake a notice and comment rulemaking. Indeed the force of the *Vermont Yankee* rule is all the greater when, as here, the agency seeks to give more procedural safeguards and thereby avoid statutory and even constitutional questions of fairness. See *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Court should review this case to assert the vitality of *Vermont Yankee*. Surely it cannot be true, as one commentator has stated, that *Vermont Yankee* is "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, *Administrative Law Treatise* 616 (2d ed. 1978), quoted and discussed in, Scalia *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 (1978). It is time for the Court to explain the authority and authoritativeness of *Vermont Yankee*. The Court should review this case to emphasize "that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524.

## III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND LIMITS IMPROPERLY THE AUTHORITY OF OMB UNDER THE PAPERWORK REDUCTION ACT TO MINIMIZE PAPERWORK BURDENS IMPOSED ON THE PUBLIC.

### A. The Importance of the Paperwork Reduction Act to the Hazard Communication Standard.

The Paperwork Reduction Act of 1980 ("PRA") is the culmination of longstanding efforts by Congress\* to "minimize the Federal paperwork burden for individuals, small businesses, state and local governments and other persons." 44 U.S.C. § 3501(a)(1). The critical need for this law was established by the Commission on Federal Paperwork, which concluded in its final report that federal paperwork requirements imposed annual costs of 25

\* The Paperwork Reduction Act was a "rewrite" of the Federal Reports Act of 1942, and was intended to "strengthen the clearance process" established under the prior law. S. Rep. No. 96-930, 96th Cong., 2d Sess. 13, reprinted in 1980 U.S. Code Cong. & Admin. News 6241, 6253.

to 35 billion dollars on private industry, and 8.7 billion dollars on individuals.<sup>9</sup> To minimize this formidable burden, Congress directed OMB to review all information requests proposed by agencies to determine whether such collection of information "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility." 44 U.S.C. § 3504(c)(3) (1982). The effectiveness of the PRA in ameliorating the burden on the public has been great. Between 1981 and 1986, agencies subject to PRA review have reduced the paperwork burden imposed on the public by over 560 million hours annually<sup>10</sup> or 44 percent of the burden that existed in 1980.<sup>11</sup> The Administration estimated that the paperwork burden on the public in fiscal year 1988 would decrease by 66.1 million hours, representing the seventh year of reduction by the federal government since 1981.<sup>12</sup>

OMB adhered closely to its lawful authority in reviewing OSHA's final HCS and, based on an extensive record and detailed consultation with the agency, disapproved three limited provisions in the rule.<sup>13</sup> OMB's disapproval

<sup>9</sup> *Final Summary Report of The Commission on Federal Paperwork* 5 (1977).

<sup>10</sup> March 10, 1988 Letter from James C. Miller III, Director, Office of Management and Budget, to President Ronald Reagan transmitting the Administration's Information Collection Budget for Fiscal Year 1988, 1.

<sup>11</sup> Executive Office of the President, Office of Management and Budget, *Regulatory Programs of the United States Government*, April 1, 1987-March 31, 1988, 1-11.

<sup>12</sup> See March 10, 1988 letter from James C. Miller III, 1. According to the letter a net increase of approximately 140 million hours resulted from three federal statutes enacted in 1987.

<sup>13</sup> The Third Circuit, in ordering the Secretary to proceed directly to a final rule without the benefit of a notice of proposed rulemaking prevented OSHA from complying with 44 U.S.C. § 3504(h). That

of the requirement that material safety data sheets ("MSDSs") be exchanged by each employer at multi-employer worksites was based solely on the determination that such requirement "does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces."<sup>14</sup> OMB also disapproved the overly narrow scope of the exemption for consumer products, stating, "the record indicates that this exemption would continue to place under the HCS large number of consumers for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial."<sup>15</sup>

section requires an agency to notify OMB not later than publication of notice, of any proposal rule which includes a collection of information requirement. This important procedural requirement, sponsored by Senator Kennedy as Amendment 1177 of the Senate Judiciary Committee, is intended to coordinate Executive review of collection of information requirements in agency rulemakings with regulatory oversight by the Executive Office of the President by providing the agency an opportunity to respond to OMB comments. See Remarks of Senator Edward Kennedy, 126 Cong. Rec. 14,689 (daily ed. Nov. 19, 1980). Thus, the Court's short-circuiting of the APA also thwarted the critical interagency deliberative process required by the Kennedy Amendment.

<sup>14</sup> October 28, 1987 letter from Wendy L. Gramm, Administrator for Information and Regulatory Affairs, Office of Management and Budget, to the Honorable Thomas C. Komarek Assistant Secretary for Administration and Management, Department of Labor, disapproving the collection of information requests in the final HCS. The record is replete with examples where trade groups demonstrated in testimony before OMB that this provision of the HCS had no practical utility. These same groups provided numerous alternatives which would accomplish the same objective of workplace hazard communication without the full paperwork burden imposed by the rule. *Id.* at 7-9. See also October 28, 1988, "Comments and Request for Hearing by the Construction Industry Hazard Communication Coalition Proposed Revisions to OSHA Hazard Communication Standard" (53 Fed. Reg. 29,821), submitted to OSHA Docket Officer at 17-19.

<sup>15</sup> Letter of Gramm to Komarek at 8. The OMB record illustrated how OSHA's limited consumer product exemption (29 C.F.R.

OMB disapproved a third provision of the final HCS that would have exempted FDA regulated drugs to the extent that they are in "solid, final form for direct administration to patients." 29 C.F.R. §§ 1910.1200(b)(6)(viii) (1988). The OSHA exemption did not exclude drug capsules containing liquids or particles. The narrow scope of the exemption resulted in drug wholesalers initially having to distribute 4.8 million MSDSs despite the fact that a professional package insert of comprehensive hazard information is already included in "every single package of a prescription drug in this country."<sup>16</sup>

**B. The Petition Should be Granted To Resolve the Conflict Between the Third and D.C. Circuits and to Reestablish the Director's Intended Role in Regulating the Paperwork Burden Imposed by Administrative Agencies.**

The Third Circuit erred in ruling that the HCS requirement to collect and distribute MSDSs does not come within the reach of the PRA and that, because the recordkeeping requirement had a regulatory purpose under the OSH Act, it was exempt from PCA review. These two rulings misinterpret the law and undermine the important powers given to OMB. The Court should take this case so that OMB can fulfill its congressional man-

§ 1910.1200(b)(6)(vii)) lacks practical utility. Under the OSHA exemption employers could not discern when the exemption would apply. Witnesses before OMB testified that this flaw would lead to exaggerated overcompliance causing a substantial paperwork burden involving the maintenance of MSDSs. Moreover, hazard information on consumer products was duplicative of that required by the Consumer Product Safety Commission. Transcript of OMB hearings on the *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communications Standard*, Oct. 16, 1987, at 90, 148-52.

<sup>16</sup> Testimony before OMB of the National Wholesale Druggists Association. *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communication Standard*, *supra* note 15, at 168-79

date to limit paperwork requirements imposed on members of NAM without significant public benefit.

The D.C. Circuit has interpreted the PRA's predecessor, the Federal Reports Act of 1942 (codified at 44 U.S.C. § 3501-3520 (1976)), to apply to the collection of all information required by a federal agency for any regulatory purpose, whether or not the information is furnished directly to the agency. *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). The D.C. Circuit Court rejected arguments that the Federal Reports Act applied only to documents furnished to an agency. Interpreting the PRA, the court wrote that "under the Paperwork Act . . . OMB holds the same substantive power as it did under the [Federal] Reports Act. Where it determines that collection of information is unnecessary, the Agency may not proceed with the collection." *Id.* at 1453. The Court continued "[a]pellants cannot seriously believe . . . Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; it is the record-keeping and data-gathering that constitute the burden." *Id.*

The attempt by the Third Circuit to distinguish *Action Alliance* and thus avoid the conflict is unsuccessful. The D.C. Circuit quoted the paperwork requirement that OMB lawfully disapproved: a "'written self-evaluation of [the federal fund recipients'] compliance under the [Age Discrimination] Act' . . . [and a] self evaluation available on request to the agency and to the public." *Id.* at 1452 (emphasis added, citations omitted). This requirement is little different from the HCS requirement that the MSDSs be made available to employees and "upon request, to . . . the Assistant Secretary [of Labor] . . . ." 29 C.F.R. § 1910.1200(g)(11) (1988).

The Third Circuit's decision is also inconsistent with the PRA's legislative history<sup>17</sup> and, without so much as

<sup>17</sup> The Senate Report includes within the coverage of the PRA information collected for purposes of disclosure to the public. The

a mention, rejects the OMB interpretation of the PRA. OMB's regulations, which were promulgated on March 31, 1983, define the "collection of information" as:

the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.

5 C.F.R. § 1320.7(c) (1988) (emphasis added). Subsection (2) of Section 1320.7(c) further provides, in part, that:

*Requirements by an agency, a person to obtain or to compile information for purpose of disclosure to members of the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.*

(Emphasis added). Thus, the Third Circuit, without explanation, rejected a "permissible construction" of the

Senate Report addresses public disclosures required by the Securities and Exchange Commission stating, "In this connection, federally mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purpose of the Federal Securities Laws." S. Rep. No. 96-930, 96th Cong., 2d Sess. 39, reprinted in 1980 U.S. Code Cong. & Admin. News 6241, 6279. This view was reiterated by Sen. Chiles, the Sponsor when Congress considered amendments to the PRA in 1984. He explained:

[t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43.

statute by the administering agency, contrary to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

The Third Circuit also mistakenly and substantially narrowed the scope of the PRA by ruling that 44 U.S.C. § 3518(e) (1982) prevents OMB from performing its statutory function with respect to paperwork requirements when the rulemaking "embodies substantive policy decision-making entrusted to the other [non-OMB] agency." *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988). This determination also conflicts with the D.C. Circuit. *Action Alliance*, 846 F.2d at 1454-55. While there may on occasion be tension between OMB duties with respect to paperwork requirements under the PRA and another agency's duties under another law, the Third Circuit's meat ax approach—OMB always looses—"carve[s] so large a slice from OMB authority" that it calls for review and adjustment by the Supreme Court. *Action Alliance*, 846 F.2d at 1455.

The plain language of the PRA shows that Congress vested sole authority in OMB to determine whether a proposed paperwork requirement imposed by a federal agency is necessary or useful in achieving a substantive policy. Under the goal of ensuring that rules of federal agencies minimize the information burden on the public, Congress ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request . . . ." 44 U.S.C. § 3507(a) (1982). Congress then directed that the function of the Director to clear information collection requests shall include a determination of whether a collection of information request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility . . . ." 44 U.S.C. § 3504(c) (2) (1982). There is nothing in the PRA that terminates this authority merely because the agency or anyone else claims that the information collection request also has a

direct regulatory function. *Action Alliance*, 846 F.2d at 1455.<sup>18</sup>

OMB acted on a well-developed record and after detailed consultation with OSHA. OMB carefully focused its activities *only* on requirements for the collection of information and restricted its disapproval to such requirements, leaving intact the underlying regulatory approach of OSHA. The disapproved provisions involve the collection and maintenance for purposes of public disclosure and recordkeeping of hundreds, thousands, and in some cases millions of pages of material safety data sheets,<sup>19</sup> precisely the area of concern at which the PRA is aimed. The Court should grant the petitions to assure OMB's ability to control such excessive and costly paperwork requirements affecting NAM and all members of the public.

<sup>18</sup> The Third Circuit paid little attention to relevant legislative history when it construed § 3518(e) to deny the Director of OMB the authority to review agency rules. Prior to and during consideration of the PRA, Congress understood the Executive already to have the authority to intervene on substantive points of other agency rulemakings. See Pub. L. No. 94-78, § 4 (August 9, 1975) amending The Council on Wage and Price Stability Act, Pub. L. No. 93-387 (August 24, 1974).

<sup>19</sup> See OMB Docket 1218-0072 including written submissions accompanying April 2, 1987 and October 16, 1987 transcript of public hearings. For example the Small Business Administration estimated that a typical plumber must maintain 500 MSDSs compared with OSHA's estimate of 12. Ex. 2-21 (October 16, 1987). One contractor from Minnesota estimated that 55 file cabinets to maintain MSDSs may be required at a typical construction high rise site. Oct. 16, 1987, Transcript at 109.

## CONCLUSION

For these reasons, and upon the entire record, the petitions for writs of certiorari should be granted in both *Associated Builders and Contractors, Inc. v. Brock* and *United Steelworkers of Am. v. Pendergrass* (USWA III).

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1988  
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ELIZABETH DOLE, SECRETARY  
OF LABOR, ET AL.,

PETITIONERS,

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

RESPONDENTS.  
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ON PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT  
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BRIEF OF LAWTON CHILES AS AMICUS CURIAE  
IN SUPPORT OF THE PETITION FOR CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
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April 3, 1989

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INTEREST OF THE AMICUS CURIAE

As a member of the United States  
Senate, Amicus Lawton Chiles was the Senate  
sponsor and an author of the Paperwork  
Reduction Act of 1980, and the Senate  
sponsor of amendments to the Act contained  
in the Paperwork Reduction Reauthorization  
Act of 1986.

I support the Paperwork Reduction Act.  
I believe the Third Circuit has  
fundamentally misread the Act, and  
misconstrued its statutory scheme.

The Third Circuit opinion holds:

"In one sense the [OSHA] standard  
requires chemical manufacturers to  
collect and transmit information [to  
other members of the public], and  
employers to collect and maintain  
information [for disclosure to other  
members of the public]. It would be a  
far-fetched interpretation of the  
Paperwork Reduction Act of 1980,  
however, to hold that these activities  
fell within its coverage." 855 F2d  
108, at p. 113.

I respectfully disagree with this holding of the Third Circuit. It is inconsistent with two other Circuit Court opinions.

SUMMARY OF REASONS FOR GRANTING THE PETITION

(1) The Third Circuit opinion ignores the language of the statute and applicable legislative history. The Senate and the House of Representatives explicitly considered whether collection and maintenance of information for disclosure by one private party to another (or to the public as a whole) required by regulation should be subject to the Act, and decided, yes, that it should.

(2) In United States v. Bruce Smith, 866 F2d 1092 (9th Circuit, No. 87-3020, decided January 23, 1989), the Circuit Court reversed criminal convictions because the Forest Service failed to comply with provisions of the Paperwork Reduction Act.

Had the convicted appellants filed the same appeal in the Third Circuit, the result -- based at least on the effusive dicta in the Third Circuit opinion -- would have been different.

DISCUSSION

I. REVIEW IS NECESSARY TO CORRECT A MISREADING OF THE STATUTE AND THE APPLICABLE LEGISLATIVE HISTORY.

It is clear that the Paperwork Reduction Act covers "recordkeeping" (44 U.S.C. 3502(4) and (11)).

We in Congress specifically defined the term "recordkeeping" to mean a "requirement imposed by an agency on persons to maintain specified records." (44 U.S.C. 3502(17)). On its face, this definition contemplates a federally sponsored requirement which entails maintaining information for public, third party, or other disclosure purposes.

The notion that the information maintained must eventually go to or be used

by the government is clearly not implied by the language of this definition. To the contrary, prior to enactment we explained just the opposite. This "definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency." (Senate Committee Report, No. 96-930, 96th Congress, 2nd Session, at p. 40).

Had the Third Circuit reviewed the legislative history behind why Congress specifically defined the term, that court would have discovered explicit consideration of whether regulations which require persons to disclose information to third parties should be covered by the clearance requirements of the Act. Both the House and Senate spoke directly to this precise issue.

The Comptroller General of the United States was the reason. In 1973, the

Congress amended the Federal Reports Act and gave the General Accounting Office (GAO) the clearance authority previously held by the Director of the Office of Management and Budget (OMB) for information collected by the independent regulatory agencies. (Pub. L. 93-153, sec. 409). The Comptroller was frustrated in his efforts to perform his clearance responsibilities because several agencies resisted the GAO's efforts by asserting, among other things, that disclosure requirements to third parties were not covered by the Federal Reports Act definition of "information". (See Federal Reports Act of 1942, 44 U.S.C. Section 3502 (1976)).

In a report to Congress in 1976 the Comptroller commented:

"Two agencies, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), believe that only a small number of their information-gathering

activities are subject to the Federal Reports Act.

SEC believes that some of its activities involve collection of information subject to 44 U.S.C. 3512, but other SEC responsibilities involve the "disclosure" of information to the public rather than collection activities, and accordingly, are not subject to that provision. The SEC contends that, in contrast to other Government agencies which solicit information for their own purposes, SEC serves as a conduit through which information is disclosed to investors pursuant to Federal securities laws. (Report to the Congress by the Comptroller General of the United States, "Status of GAO's Responsibilities Under the Federal Reports Act", OSP-76-14, May 28, 1976, at p. 15).

"... The underlying reasons for these agencies' refusal to submit most of their forms to us for clearance are that they believe this would be an intrusion into their regulatory responsibilities. We disagree with the position of SEC and CFTC and are currently working with these agencies to resolve the issue." (Ibid., at p. 16).

The Comptroller recommended the Congress clarify and strengthen the Federal Reports Act "to allow the clearance agency

to challenge the need for regulatory information." (Ibid. at p. 20).

In 1974, the Congress established the Commission on Federal Paperwork. (Pub. L. No. 93-556, 93rd Congress, 88 Stat. 1789). "The legislation was the result of Congressional concern that the Federal Reports Act of 1942 was not effective in limiting the Federal paperwork burden." (See "Legislative History of the Commission on Federal Paperwork," prepared by the Legislative Digest Section, Office of the General Counsel, United States General Accounting Office, at p. iii). Since the Comptroller General and the Director of OMB were statutory members of the Commission, the issue of whether disclosure requirements to third parties should be covered by the clearance process was thrashed out by that body. (See "The Reports Clearance Process", A Report of the

Commission on Federal Paperwork, September 9, 1977, at p. 43).

The Commission on Federal Paperwork noted:

"The Act is not clear on its coverage of a major portion of the paperwork burden -- recordkeeping requirements -- although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines...Not all agencies covered by the Federal Reports Act comply fully with its requirements." (Ibid, at p. 1).

"For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws. There were negotiations and discussions from time to time between the OMB and the agencies concerned, not always with clear-cut resolution. Generally, the

OMB was not inclined to make a head-on confrontation, nor did it have any specified statutory means to enforce compliance. (Ibid., at p.43).

In June of 1978, when I held Senate hearings on efforts to reduce federal paperwork burdens, the Comptroller General brought his views and that of the Paperwork Commissions to my attention. ("Efforts to Reduce Federal Paperwork Burdens", Hearing before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, 95th Congress, 2nd Session, June 28, 1978, at page 45). The term "recordkeeping" was incorporated in the definition of "collection of information" in the bill I introduced in June of 1979. (For text of S. 1411, see "Paperwork and Redtape Reduction Act of 1979", Hearing before the Subcommittee on Federal Spending Practicers and Open Government of the

Committee on Governmental Affairs, United States Senate, 96th Congress, 1st Session, hearing of November 1, 1979, at page 89).

Congressmen Brooks and Horton (who was a co-Chairman of the Paperwork Commission) introduced a House companion to S. 1411 in February of 1980. (For text of H.R. 6410, see "Paperwork Reduction Act of 1980", Hearings before a Subcommittee on Government Operations, House of Representatives, 96th Congress, 2nd Session, February 7, 21, and 26, 1980, at p. 3). When the Comptroller General testified before them he noted that their bill included his recommendations to resolve the problems he and the Paperwork Commission had identified with the clearance process.

"Section 101 of the bill replaces the Federal Reports Act, incorporating five needed changes. First, recordkeeping requirements

are specifically included in the reports clearance process..." ...

"The Federal Reports Act is presently unclear on whether recordkeeping requirements are subject to clearance. In practice, both GAO and OMB have required that they be cleared. Some agencies, however, have resisted compliance with these efforts." (*Ibid.*, House hearings on H.R. 6410, at p. 39).

The House Committee gathered statements from the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Reserve System, and the Securities and Exchange Commission, all of whom raised concerns relating to the proposed changes to the Reports Act. (*Ibid.*, House hearings on H.R. 6410, at p. 313-336).

The SEC had this to say:

"...This expansion of the scope of the Federal Reports Act is of major concern to us. We do not think the purpose of the Bill is, or should be, to subject the Commission's disclosure and enforcement efforts to oversight by the Office of Management and Budget. We do not believe, for example, that OMB should determine whether

information about possible selfdealing between corporate officers and the company ought to be disclosed in a proxy statement. The definition of "collection of information" is so broad, however, that it could be read as encompassing this information, which is collected on standard, statutorily authorized forms. (Ibid., at p. 331).

On the Senate side, I held hearings in November of 1979 and invited the SEC and FCC to testify publicly on their concerns, since, among other issues, the Senate bill also incorporated the term recordkeeping in its definition of "collection of information" and "information collection requests". Commissioner Evans of the SEC made the identical point to me. (See Hearings on S. 1411, November 1, 1979, at p. 67). Commissioner Brown of the FCC expressed similar concerns. I responded in part:

"Senator Chiles. Well, we are delighted to get that best advice and that is the reason for this hearing, to get your concerns about it. ... Yet, when we go out into

the countryside, when we go out and listen to people, they do not feel anybody is doing a good job, the Congress, the executive branch, the independent regulatory agencies, or anyone. They are demanding that something be done. So, again, we are talking about weighing something here. We are talking about not wanting to cripple the mission of the independent regulatory agencies nor the mission of the executive agencies like EPA and OSHA and all of the other agencies that are vital to the well-being of this country. But at the same time, we are trying to put some governor on this thirst for information and some rational decisionmaking processes that Congress can review and that the people can hold accountable, and that we can say we are trying to get a handle on. ("Paperwork and Redtape Reduction Act of 1979," Hearings on S. 1411, 96th Congress, 1st Session, November 1, 1979, at p. 87).

The Congress deliberately chose to retain the definition of recordkeeping that had been recommended to it by the Comptroller General and the Paperwork Commission. Both the Senate and House Reports spoke directly to the point of

whether disclosure requirements were to be covered by the Act's requirements.

[Senate]: "Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. The definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency." ("Paperwork Reduction Act of 1980," Senate

Report on S. 1411, Senate Rep. No. 96-930, 96th Congress, 2d Session, September 8, 1980, at pages 39-40).

[House]: "...the definition of "collection of information" clarifies an ambiguity as to the types of information collection covered by the Act. The Comptroller General testified that certain interpretations, such as that by the Securities and Exchange Commission, severely limit the scope of the act and the controls over Federal information collection efforts. ("Paperwork Reduction Act of 1980", House Rep. No. 96-835, 96th Congress, 2d Session, March 19, 1980, at p. 19). ...

"The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements. The Committee fully expects SEC to comply with the "more extensive" definition of collection of information contained in H.R. 6410. (Ibid, at p. 23).

II. REVIEW IS NECESSARY TO RECONCILE DIFFERENCES AMONG THE CIRCUITS ON THE FORCE AND EFFECT OF THE PAPERWORK REDUCTION ACT.

The Paperwork Reduction Act, as a recodification and expansion of the Federal Reports Act of 1942 (44 U.S.C. 3501 et seq., (1976)), is deliberately structured as a coordinated whole, in order to have its various provisions build upon and reinforce each other. Agencies are to justify their need for a recordkeeping requirement and submit their proposal to the Office of Management and Budget. The public is to have early and meaningful opportunity to comment as part of the review process. As the ultimate sanction and public protection, if an agency fails to participate in the statute's review process, or fails to display a current control number, then, "Notwithstanding any other provision of law," the public is not subject "to any penalty for failing to

maintain" information. (Paperwork Reduction Act of 1980, "44 U.S.C. 3512. Public protection.")

In this context, the ruling of the Third Circuit is in conflict with a ruling of the Ninth Circuit in United States v. Smith, 866 F2d 1092 (U.S. Court of Appeals, 9th Cir., No. 87-3020, decided January 23, 1989). In Smith, the Ninth Circuit was faced with determining whether a Forest Service regulation, promulgated pursuant to the agency's statutory mission, entailed an "information collection request" within the meaning of the Paperwork Reduction Act. Judgments of conviction had been entered against the appellants. That Court had to further decide whether Section 3512 of the Act prohibited the judgments of conviction entered against the appellants. The Court ruled the regulation did constitute an information collection request, that it did

not display a current control number as required by section 3512 of the Act, and reversed the convictions.

In acknowledging a statutory scheme underpinning the Paperwork Reduction Act which culminates in the Public Protection section, (44 U.S.C. Sec. 3512), the Ninth Circuit recognized that an agency engaged in enforcing criminal sanctions of its substantive programs was not relieved from its responsibilities under the Paperwork Reduction Act. The Court thereby affirmed a fundamental premise of the Paperwork Reduction Act that every person is entitled to be assured that their government has checked the need for information before it asks them to provide or maintain information.

Certainly, the pursuit of criminal sanctions by an agency "embodies

substantive policy decision making". (See 3rd Cir. opinion 855 F2d at p. 112).

In contrast, the Third Circuit, relying on an isolated reading of two provisions -- 3504(a) and 3518(e) -- and not on the provisions of the Act as a whole, suggests that if an agency activity involving the collection of information also involves substantive policies and programs, it is relieved from its responsibilities under the Paperwork Reduction Act to submit its proposals to the Director and the public for review. (See 3rd Cir. opinion, 855 F2d 108, at p. 113).

To fall outside the scope of the Director's responsibilities is to fall outside the scope of the public protection afforded by section 3512 of the Paperwork Reduction Act. Had appellants in Smith, supra., pled their case in the Third Circuit the result would have been

different. The two Circuits are in conflict on the scope of this basic right afforded by the Paperwork Reduction Act. The Court should review this conflict between the Circuits and uphold the integrity of the Paperwork Reduction Act.

The discussion presented herein with regard to the proper interpretation of the Paperwork Reduction Act applies equally to the issues raised in the pending Petition for Writ of Certiorari in No. 88-1075, Associated Builders and Contractors, Inc. and the Construction Industry Trade Associations v. OSHA.

I also note the opinion of the Third Circuit is in conflict with the ruling of the D.C. Circuit in Action Alliance of Senior Citizens v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending (No. 88-849).

### SUMMARY

As I noted when Congress amended the Paperwork Reduction Act in 1986:

"A fundamental premise of the Paperwork Reduction Act is that every citizen is entitled to have their Government check the need for information requests made of them."

...

"The law was intended to be comprehensive in its coverage of federally sponsored "collections of information." Exemptions to this coverage, either by agency or by class of information were specifically set out in the definitions of section 3502 or the savings provisions of section 3518. The notion the law was dedicated primarily to "forms, questionnaires, and surveys" and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally "sponsored collections of information" is a fundamental misreading of what the law states, what the Congress of 1980 intended, and what this Committee affirms in the amendments of 1986..." (Statement of Sen. Chiles upon Senate passage of the Paperwork Reduction and Reauthorization Act of 1986, Congressional Record, Oct. 16, 1986, at p. 16740).

This Third Circuit opinion interprets the Paperwork Reduction Act in a way

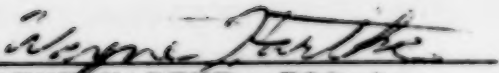
directly contrary to the intent of the Senate and the House of Representatives when they constructed the statute in 1980 and amended it in 1986. The 3rd Circuit opinion is also inconsistent with an interpretation of the Paperwork Reduction Act expressed by the 9th Circuit and the D.C. Circuit.

CONCLUSION

For these reasons, Amicus Lawton Chiles joins the Solicitor General of the United States in requesting the Court grant a Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
v. *Petitioners,*

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

ASSOCIATED BUILDERS AND CONTRACTORS, INC. and the  
CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,  
v. *Petitioners,*

THE OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit

**BRIEF OF THE BUSINESS COUNCIL ON THE  
REDUCTION OF PAPERWORK AS AMICUS CURIAE  
IN SUPPORT OF THE PETITION FOR CERTIORARI**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-1434

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ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
v. *Petitioners,*

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

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No. 88-1075

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ASSOCIATED BUILDERS AND CONTRACTORS, INC. and the  
CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,  
v. *Petitioners,*

THE OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION,  
UNITED STATES DEPARTMENT OF LABOR, *et al.*,  
*Respondents.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit

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**BRIEF OF THE BUSINESS COUNCIL ON THE  
REDUCTION OF PAPERWORK AS AMICUS CURIAE  
IN SUPPORT OF THE PETITION FOR CERTIORARI**

---

The Business Council on the Reduction of Paperwork  
("BCORP") respectfully submits this brief as amicus  
curiae in support of the petitions for writ of certiorari

filed by the petitioners, Elizabeth Dole, Secretary of Labor, and the Associated Builders and Contractors, Inc. and Construction Industry Trade Associations.<sup>1</sup> Pursuant to Supreme Court Rule 36.1, the parties have consented to the filing of this brief. BCORP has filed their written consents with the Clerk.

### INTEREST OF THE AMICUS CURIAE

The Business Council on the Reduction of Paperwork ("BCORP") is a non-profit, non-partisan association whose basic purpose is to assist the federal government, business entities and not-for-profit research institutions in maximizing the value and meaningfulness of federally generated data and records, while minimizing the burden of federally sponsored reporting and recordkeeping. BCORP's membership consists of twenty-nine national and regional trade associations, and sixty individual business and educational organizations. Through its trade association members, BCORP reaches out to thousands of other small and large enterprises to inform and to involve them on issues involving the burden and practical consequences of regulatory reporting and recordkeeping requirements. Many BCORP members are adversely affected by this ruling.

BCORP is the successor to the Advisory Committee on Government Questionnaires which was originally organized in 1942 at the request of the Director of the Bureau of the Budget in response to the enactment of the Federal Reports Act, ch. 811, 56 Stat. 1078 (1942). The Advisory Committee was later renamed the Advisory Council on Federal Reports ("ACFR"), and following the

<sup>1</sup> This brief addresses only the question presented under the Paperwork Reduction Act which is the sole question addressed by the Secretary of Labor in the government's petition in No. 88-1434. It is one of four questions presented by Petitioners in No. 88-1075. Petitioners in 88-1075 raise additional questions for review which are not addressed by *amicus curiae* in this brief.

enactment of the Federal Advisory Committee Act in 1972 (86 Stat. 770), 5 U.S.C.A., Appendix 2 § 1 *et seq.* (1967), which terminated the existence of numerous federal advisory committees (such as ACFR) whose charters were not expressly renewed, ACFR reorganized as the Business Advisory Council on Federal Reports ("BACFR"). BACFR's stated purpose was to advise the Director of the Office of Management & Budget ("OMB") and the Comptroller General of the United States, consistent with their respective statutory responsibilities under the Federal Reports Act, in coordinating the information—collecting services of the federal agencies with a view to minimizing the burden upon business enterprises, reducing the cost of government, and improving the quality of federally sponsored data collection and recordkeeping programs. In 1986, the association's name was changed to BCORP to reflect the national mandate established by Congress to bring about the *reduction* of unnecessary paperwork. BCORP is now the single private organization devoted exclusively to this purpose.

BCORP's interest in the present dispute is more than academic. This is a case of enormous economic significance, not only to BCORP's membership, but to the commercial and research sectors of our economy and the public generally. The rule of law established by this case threatens to exempt from OMB review under the Paperwork Reduction Act of 1980 ("PRA") many unnecessary, federally mandated recordkeeping requirements with the effect of disrupting the Congressional goal of reducing paperwork burden. The court of appeals ruling lays open to challenge all OMB decisions under the PRA when those OMB decisions are based and articulated solely in terms of reducing paperwork burden. The ruling in this case will curtail, by judicial fiat, the congressional objective of *reducing* the burden of federally mandated recordkeeping and reporting by eliminating OMB clearance of agency rules and thus imposing costs on BCORP's mem-

bers and the nation's businesses that might have been avoided as Congress intended.

BCORP has another interest in this suit. One of the fundamental improvements which the PRA, 44 U.S.C. § 3501 *et seq.*, made to the old Federal Reports Act is the public participation provisions now codified in §§ 3507(a), 3508 and 3517 of Title 44 of the U.S. Code whereby the Director of the OMB must give interested agencies and persons a "meaningful opportunity to comment" before determining whether the "collection of information" by an agency is "necessary for the proper performance of the functions of the agency." As noted by the Senate Governmental Affairs Committee in the Senate Report accompanying S. 1411, which became the PRA, BCORP's predecessor-in-name:

The Business Advisory Council on Federal Reports (BACFR) has monitored the operations of the Federal Reports Act throughout the Act's history. The Council stressed to the Committee the value of increased public awareness and participation. As a result of their comments on S. 1411, the Committee has taken additional steps to provide a meaningful opportunity for public involvement.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 16 (1980). In this case, BCORP petitioned OMB to hold hearings on OSHA's Hazard Communication Standard ("HCS") to hear the views of the public on this significant new federal recordkeeping requirement, and OMB held hearings. BCORP, some of its members, OSHA, and other interested parties participated in those hearings and shared their views on the paperwork burden issue posed by the HCS as well as the revised HCS when it was extended to the non-manufacturing sector. In granting the motion of the United Steelworkers of America and Public Citizen, Inc. from which the present dispute arises, the Third Circuit effectively ruled that public hearings on the paperwork burden posed by the recordkeeping require-

ments of the revised HCS should never have been held at all.<sup>2</sup> This result undermines the nation's effort to involve both the public and the agencies in the paperwork reduction process so that all interested parties can evaluate the need for information and the cost attributable to collecting, maintaining and disseminating it.

BCORP submits this brief on behalf of all of its members as *amicus curiae* in support of the Petitions for Writ of Certiorari to inform the Court of the importance of the issue presented.

### PRELIMINARY STATEMENT

Petitioners seek a writ of certiorari in connection with a decision of the Third Circuit Court of Appeals. *United Steelworkers of America v. Pendergrass* ("USWA III"), 855 F.2d 108 (3rd Cir. 1988). This case addresses the authority of OMB under the PRA to review whether an agency (OSHA) has met its responsibility under the PRA to reduce the burden of paperwork recordkeeping requirements imposed by the HCS. The impact of this case extends far beyond OSHA and the revised HCS which is the subject of this suit. It affects many other disclosure-oriented recordkeeping requirements which federal agencies are now promulgating and will likely promulgate in the future. First, the Third Circuit held that OMB "second-guessed" the "substantive policy decision making entrusted to [OSHA]," and lacked authority to do so. The holding is erroneous, and the logical extension of the court of appeals' reasoning is not limited to OSHA, but has significance for OMB review of all other agency actions under the PRA. Second, the Third Circuit held

<sup>2</sup> Like the Petitioner, amicus notes that the Paperwork Reduction Act issue was before the court on a motion to hold the Secretary of Labor in contempt of the Third Circuit's prior order in *United Steelworkers of America v. Pendergrass* ("USWA II"), 819 F.2d 1263 (3rd Cir. 1987) for submitting the revised HCS to OMB for review in the first place.

that the specific provisions of the HCS which were disapproved by OMB did not "require the collection of information" and therefore they were not subject to OMB review under the PRA. This holding is equally erroneous, and it threatens to eliminate from OMB review all federally mandated *recordkeeping* requirements simply because the data in the records may, but do not necessarily have to be reported back to a federal agency.

### REASONS FOR GRANTING THE PETITION

Information is a valuable economic resource; it is valuable to government, business enterprises, workers, and consumers. Like any other economic resource, there is a cost in acquiring information, there is a cost in maintaining information, and there is a cost in distributing information. These costs naturally affect the cost of government, the cost of doing business, and the cost of bringing goods and services, public or private, to the public.<sup>3</sup>

Just as they would treat any other economic resource, businesses, workers, and consumers tend to acquire, distribute, and receive information in the most efficient manner they know.<sup>4</sup> In enacting the Federal Reports Act and the PRA, Congress recognized that the federal government should set efficiency in the collection, maintenance, and dissemination of information as a national

<sup>3</sup> This Court has recognized this fact in another context. See *FTC v. Indiana Federation of Dentists*, 106 S.Ct. 2009, 2019 (1986) ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market \* \* \*"). See also *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976).

<sup>4</sup> G. STIGLER, *THE ECONOMICS OF INFORMATION* and *INFORMATION IN THE LABOR MARKET* in *THE ORGANIZATION OF INDUSTRY* 171 and 191 (1968).

objective when it was required by the federal government. 44 U.S.C. § 3501. The PRA itself set an immediate objective of *reducing* the existing burden of Federal collection of information within three years by twenty-five percent. 44 U.S.C. § 3505(1). The need for this legislation was a response to the finding of the Federal Paperwork Commission which estimated in 1977 that the cost of Federal Paperwork requirements then amounted to \$100 billion a year, about \$500.00 for every man, woman and child. S. Rep. 96-930, 96th Cong., 2d Sess. 3 (1980). The Paperwork Reduction Reauthorization Act of 1986 set a further goal of reducing the burden of Federal collections of information by at least 5 percent in each of fiscal years 1987, 1988 and 1989. 44 U.S.C. § 3505(4).

In its most recent report to the President, OMB estimated that the public will spend almost 2 billion hours in fiscal year 1988 complying with federal information collection requests.<sup>5</sup> Sixty-three percent of the burden falls on business and other institutions.<sup>6</sup> In the same report, OMB reported that in every year but fiscal year 1987 OMB has actually been able to reduce paperwork burden: from 1981-1987 OMB was able to reduce that burden by an aggregate of 560 million hours pursuant to its authority under the PRA.<sup>7</sup>

OMB, through its Office of Information and Regulatory Affairs (OIRA), is charged with the responsibility of administering the PRA. 44 U.S.C. § 3503. Additionally,

<sup>5</sup> Office of Management and Budget, *INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT* 1 (March 10, 1988). The figure may actually be much higher. The I.R.S. recently released a report stating that the taxpayer paperwork burden alone was 5.3 billion hours. A.D. LITTLE & CO., *STUDY FOR THE INTERNAL REVENUE SERVICE ON TAXPAYER PAPERWORK BURDEN* (August 31, 1988).

<sup>6</sup> Office of Management and Budget, *id.* at 14.

<sup>7</sup> *Id.* at 4.

each federal agency is responsible for "complying with the information policies, principles, standards, and guidelines prescribed by the Director" of OMB. 44 U.S.C. § 3506(a). The Director of OMB is granted express authority to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. § 3516.

Within the framework of the PRA, it is initially the responsibility of each federal agency to determine the agency's "need for the information" and estimate the burden that will result from the information collection request. 44 U.S.C. § 3507(a). OMB then fulfills its statutory mission to minimize the cost of collecting, maintaining and disseminating information, under the statutory grant of authority contained in 44 U.S.C. §§ 3504(a), 3504(c), 3507(a) and 3508 by reviewing an agency's "information collection requests"; in other words, reviewing whether an agency has met its statutory responsibilities under the PRA:

#### § 3504. Authority and functions of Director.

(a) The Director shall develop and implement \* \* \* and oversee the review and approval of information collection requests, \* \* \* The authority of the Director under this section shall be exercised consistent with applicable law.

(c) The information collection request clearance and other paperwork control functions of the Director shall include—

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency.

#### § 3507. Public information collection activities— Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information—

\* \* \*

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

#### § 3508. Determination of necessity for information; hearing

Before approving a proposed collection request, the Director shall determine whether the collection of information by an agency *is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility*. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency *is unnecessary, for any reason, the agency may not engage in the collection of the information*. (Emphasis supplied).

The relationship between a federal agency and OMB under the PRA is also set out in 44 U.S.C. § 3518:

#### § 3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

\* \* \*

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

Under this statutory framework, Congress has clearly "subjected" the federal agencies to the power vested in OMB and the Director of OMB to determine whether a collection of information by an agency is "necessary for the proper performance of the functions of the agency." No other construction of Sections 3506(a), 3507(a), 3508 and 3518(a) is possible.

In *USWA III*, the Third Circuit, after reciting only two of the above-quoted statutory provisions (§§ 3504(a) and 3518(e)), held:

Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either: (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

**I. Review Is Necessary To Resolve A Conflict Among The Circuits Over What Constitutes A "Collection Of Information" Under The PRA.**

*Action Alliance of Sr. Citizens of Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988) involved a challenge to OMB's decision under the old Federal Reports Act to eliminate an HHS requirement that a recipient of federal funds under the Age Discrimination Act complete a written self-evaluation of its compliance under the Act and to make such self-evaluations available

on request to HHS and the public. The D.C. Circuit rejected as "pure pettifoggery" appellant's objection that because the recipients were not required to submit their written self-evaluation to an agency that it did not constitute a "collection of information." The D.C. Circuit admonished (846 F.2d at 1453-54):

Appellants cannot seriously believe that in enacting the Reports Act, Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; *it is the record-keeping and data-gathering that constitute the burden*. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the establishment or maintenance of records . . . which are to be used or be available for use in the collection of information." (Emphasis in original).

In contrast, the Third Circuit in this case read both the Federal Reports Act and the PRA more narrowly (855 F.2d at 113):

The [PRA], historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government *for its own regulatory or statistical purposes*. (Emphasis supplied).

The Third Circuit purported to sidestep the holding of *Action Alliance* on the grounds that the OSHA regulation at issue<sup>8</sup> did not require the employer to "compile" information but merely to transmit it or disclose it to employees. The PRA is not so narrow and it regulates agency rules which require persons to maintain information for disclosure to members of the public or the

<sup>8</sup> Specifically, the requirement that employers at multi-employer workplaces maintain or provide to other employers at the workplace a MSDS for each hazardous chemical. 29 C.F.R. § 1910.1200 (e) (2).

public-at-large. An "information collection request" is defined broadly to include not only report forms and questionnaires but a "collection of information requirement or similar method calling for the collection of information." 44 U.S.C. § 3502(11). The "collection of information" is likewise defined broadly to include "the obtaining or soliciting of facts \* \* \* through the use of \* \* \* identical recordkeeping requirements imposed on ten or more persons \* \* \*" 44 U.S.C. § 3502(4). A "recordkeeping requirement" is a "requirement imposed by an agency on persons to *maintain* specified records." 44 U.S.C. § 3502(17).

Under the foregoing authority, OMB disapproved of only three aspects of the revised HCS. First OMB disapproved of the requirement that employers at multi-employer worksites maintain and exchange among themselves (or maintain at a central depository) the Material Safety Data Sheets (MSDS) on hazardous chemicals. The MSDS required by the HCS to be maintained by all employers is clearly the obtaining of facts through the use of a recordkeeping requirement to maintain specified records. As the underlying OSHA regulation requires:

(8) The employer shall *maintain* copies of the required material safety data sheets for each hazardous chemical in the work place, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Emphasis supplied).

29 C.F.R. § 1910.1200(g)(8).<sup>9</sup>

Secondly, OMB effectively disapproved of the entire revised HCS insofar as it failed to *expand* the exemptions for consumer products and FDA regulated drugs

<sup>9</sup> The rule applicable to multi-employer worksites, 29 C.F.R. § 1910.1200(e)(2)(i) likewise contemplates that employers will maintain MSDS's at their own offices or at a central location in the workplace.

where there were pre-existing, duplicative disclosure requirements. The Third Circuit, overlooking the fact that it is the HCS which calls for the "collection of information," mistakenly confused the issue and concluded that "exemptions from labelling requirements which would otherwise be duplicative" cannot be a "collection of information." *USWA III* at 112. This mistake in perception led the court of appeals to hold that these two OMB disapprovals were improper as well. Since it is the HCS (not the exemption) that constitutes an information collection request, OMB's recommendation of an *expanded exemption* from the information collection requirements of the HCS to avoid duplication in these two instances is properly a "disapproval."

OMB's own regulations implementing the PRA, 5 C.F.R. § 1320, are consistent with the clear reading of the PRA and with the legislative history. As the Senate Report commented, "Information *maintained*, as opposed to directly provided by Federal agencies, is therefore subject to the clearance requirements for collections of information set forth in Section 3507." S. Rep. No. 96-930, 96th Cong., 2d Sess. 38 (1980). Furthermore, both the Senate Report and the House Report confirm that "information is also collected to form the basis for *disclosure to the public*."<sup>10</sup> Thus OMB relies on sound legislative authority when it explains that the "obtaining or soliciting of information" by an agency "includes any requirement or request for persons to *obtain, maintain, report or publicly disclose information*." 5 C.F.R. § 1320.7(c) (emphasis supplied). Furthermore, "Requirements by an agency for a person [employer] to obtain [an MSDS from a chemical manufacturer] for the purpose of disclosure to members of the public [employees] through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of informa-

<sup>10</sup> S. Rep. No. 96-930, 96th Cong., 2d Sess. 39-40 (1980). Accord H.R. Rep. No. 96-835, 96th Cong., 2d Sess. 23 (1980).

tion' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency." 5 C.F.R. § 1320.7(c)(2). This rule is entirely consistent with the purpose of the PRA "to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information," 44 U.S.C. § 3501(2), insofar as OMB has determined that the collection, maintenance, and dissemination of information is more efficiently handled by private persons instead of the Government itself.

Both the express language of the PRA and the OMB regulations promulgated thereunder do not limit the PRA's scope to some narrow version of the word "compile" for the government's own regulatory or statistical purposes. In taking that narrow course, the Third Circuit brought itself squarely into conflict with the D.C. Circuit's view that the "collection of information" encompasses "any general or specific requirement for the . . . maintenance of records . . . which are to be . . . available for use in the collection of information." *Action Alliance*, *supra* at 1454.<sup>11</sup>

More seriously, the Third Circuit totally ignored this Court's rule for reviewing an agency's construction of a statute:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

<sup>11</sup> It is not a point of distinction that *Action Alliance* was decided under the Federal Reports Act. The legislative history is unequivocal that the Federal Reports Act was "strengthened" by the PRA, and one "feature of the [PRA] which strengthen[ed]" and "clarified" the Federal Reports Act was to specifically include "recordkeeping requirements" in the definition of "collection of information." S. Rep. No. 96-930 at 13.

Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). While the intent of Congress in this case is clear and OMB has adhered to it, it is equally clear that OMB has engaged in a permissible construction of the PRA. Thus, under this Court's *Chevron* ruling, the Third Circuit has erroneously imposed its own construction on the PRA.

## II. Review Is Necessary To Resolve An Issue Of Major Economic Significance Concerning The Authority Of OMB To Reduce The Cost Of Federally-Required Recordkeeping Requirements.

It is an essential observation that OMB's decision under the PRA in this case is based on and articulated *solely* in terms of paperwork burden and practical utility. (Pet. 31a, 34a-35a, 37a).<sup>12</sup> OMB cited examples how the OMB-disapproved provisions were duplicative of other federal information requirements (Pet. 33a, 36a, 37a), and made recommendations about less burdensome alternatives. (Pet. 32a, 42a). One thing is for certain about the OMB decision in this case: on its face there is absolutely nothing to suggest that OMB's decision "embodies substantive policy decision making entrusted to [OSHA]." Indeed, the Third Circuit tacitly acknowledged this fact and concluded, without citing any fact or reason, that OMB had some hidden substantive agenda when it acted in the "guise of reducing paperwork." *USWA III* at 113.

<sup>12</sup> References herein to "Pet. ——" are to the Secretary of Labor's petition for certiorari in No. 88-1434, Appendix E.

The court of appeals accused OMB of "second-guessing" OSHA's policymaking, and held that OMB was without authority to do so, citing 44 U.S.C. §§ 3504(a) and 3518 (e), but the Third Circuit's exclusive reference to these provisions of the PRA selectively misinforms the role intended for OMB by Congress.<sup>13</sup> The very language of § 3508 instructing OMB to "determine whether the collection of information is *necessary* for the *proper performance of the functions of the agency*" necessarily means that OMB will have to contemplate the agency's substantive role and functions in assessing whether the collection of information is "necessary." At a minimum, the very word "necessary" envisions that there will be some "second guessing" of an agency's action by OMB. Consequently, the mere fact that OSHA's policymaking in this case concerned the disclosure of information to workers does not remove a disclosure-oriented record-keeping requirement from OMB's jurisdiction. Instead, it is merely one of the factors that OMB might consider in determining whether the collection of information is "necessary."<sup>14</sup> The Senate Report confirms that it was

<sup>13</sup> Sections 3504(a) and 3518(e) were two of three "safeguards" incorporated in the PRA to be sure there was no dilution in the independence of agencies. S. Rep. 96-930, 96th Cong., 2d Sess. 15 (1980). Section 3518(e) was simply a statement of belief that "the bill shall not affect in any way the existing authority of \* \* \* OMB with respect to the substantive policies and programs of departments and agencies." *Id.* In the words of the statute, OMB's authority was neither increased nor decreased, but OMB was clearly charged under § 3508 with the authority to determine whether an information collection request was necessary.

<sup>14</sup> The Director of OIRA clearly perceives such a balancing act for her role. "While the Act's underlying goal is to minimize the Federal Paperwork burden on the public, the [PRA] also recognizes the need to weigh the burdens of the collection on the public against the needs of the agency." *Paperwork Act Oversight: Internal Revenue Service Forms W-4 and W-4A, Hearing Before the Subcommittee on Federal Spending, Budget and Accounting, Senate Committee on Governmental Affairs*, S. Hrg. 100-75, 100th Cong., 1st Sess. 30 (1987) (Statement of Wendy L. Gramm).

ultimately the responsibility of the Director of OMB to determine an agency's need:

*Necessity is thus the test under this section. This determination is to include whether the collection of information: (1) has practical utility for the agency, (2) is not more than the minimum needed to meet the agency's objective, or (3) is not duplicative of similar information otherwise accessible. If the Director determines that a collection is not necessary, he should not approve it. The Director is authorized to give the agency and other interested persons an opportunity to be heard or to submit statements in writing before making a determination. Unless the collection of information is specifically required by statutory law the Director's determination is final for agencies which are not independent regulatory agencies.*

S. Rep. No. 96-930, 96th Cong., 2d Sess. 49 (1980).

Congress knew that it had given significant authority to the Director of OMB under the PRA and it saw itself as the ultimate overseer of the Director's conduct in determining necessity.

The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

*Id.* at 16.

At the time it enacted the PRA, Congress was aware that in some cases there would be a "close relationship between policy making and information management." H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). However, the legislators felt that the agencies should be capable of justifying "their need for information used to

establish policy or for other purposes." *Id.* As a practical matter, OMB demonstrated a certain solicitude for OSHA's needs in this case and suggested further rule-making by OSHA on the HCS to justify its need for other portions of the HCS. (Pet. 38a-44a). This is hardly a case of "political interference" which concerned some members of Congress and prompted the enactment of the safeguards. It is a classic case of how the PRA was intended to work.

It cannot be ignored that the PRA was enacted for the protection of the public, and in centralizing the clearance process in OMB Congress deliberately modified the practice under the Federal Reports Act in which some agencies were accountable to no one and review was otherwise divided between OMB and the General Accounting Office. Congress deliberately chose to hold one agency accountable to it for achieving the objectives of the PRA. No section of the Act is more revealing of this purpose than Section 3512.<sup>15</sup> Although not directly implicated by the facts in this case, the spirit and intent of Section 3512 is clearly offended by the Third Circuit's ruling. Enacted for the protection of the public, Section 3512 requires that an OMB control number be assigned to each information collection request. That control number is a symbol to the American public "indicating that the Director of OMB is the accountable individual in government to be sure that the information is *needed*, is *not duplicative* of information already collected, and is collected *efficiently*." S. Rep. No. 96-930, 96th Cong., 2d

<sup>15</sup> § 3512. **Public protection**

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

Sess. 9 (1980) (emphasis supplied). It is a symbol that the information collection request has been "subjected to the clearance process described by Section 3507." *Id.* The Third Circuit's decision has deprived the public of the meaningfulness of the OMB control number (No. 1218-0072) assigned to the HCS.

In focusing on Sections 3504(a) and 3518(e), and by not addressing the particular language of Sections 3506(a), 3507(a), 3508 and 3518(a), or the spirit of the PRA underlying Section 3512, the Third Circuit ignored this Court's recent command that, "In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K mart Corp. v. Cartier, Inc.*, — U.S. —, 108 S.Ct. 1811, 1817 (1988) (emphasis supplied). Secondly, the Third Circuit overlooked that Congress has expressly delegated to OMB the power to "promulgate rules necessary to exercise its authority under the PRA." 44 U.S.C. § 3516. Such regulations are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, supra* at 844. In this case, we have two agencies, with their respective spheres of expertise, supporting (1) OMB's power to review under the PRA and (2) OMB's disapprovals in this case. Under this Court's *Chevron* ruling, deference is due the agencies unless it can be shown that OMB's action was "arbitrary or capricious." *Id.* The Third Circuit made no such finding, and if the court of appeals ruling is left unreviewed, a significant part of OMB's paperwork clearance function is effectively gutted, perhaps rendering the legislative goal to reduce paperwork burden unobtainable.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted in *United Steelworkers of America v. Pendergrass*.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

## JOINT APPENDIX

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\* The opinion and judgment of the court of appeals, the denial of petitions for rehearing, the Office of Management and Budget's disapproval of certain provisions of the hazard communication standard, and related correspondence have been reproduced in the petition for writ of certiorari. The materials reproduced herein, which are not "parts of the record" (Sup. Ct. R. 30.1), have been reproduced by agreement of the parties for the convenience of the Court.

Chronological List Of Relevant Docket Entries

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565  
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY  
OF LABOR, ETC., RESPONDENT

PUBLIC CITIZEN, INC., ET AL., PETITIONER

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY  
OF LABOR, ETC., RESPONDENT

[Docketed Nov. 22, 1983]

DATE

FILINGS – PROCEEDINGS

1985

\* \* \* \* \*

May 24 Judgment granting in so far as stated below.  
Further ordering & Adjudging the Hazard  
Communication Standard to the extent that  
it is valid, et al. Further ordering & adjudg-  
ing that the Sec's rejection to the RTECS list  
overinclusive is supported by substantial  
evidence, consistent w/the OSH' Act's

(1)

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Excerpts From “Hazard Communication: Final Rule” (52 Fed. Reg. 31,853 (Aug. 24, 1987)) . . . .	40
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## DATE

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statutory purpose, & is therefore valid. Further order & adjudged that the definition of trade secrets, which is broader than the protection afforded trade secrets by state law, is invalid & the Sec. is directed to reconsider a trade secret, et al. It is further ordered & adjudged that the trade secret access rule in the standard is invalid insofar as it limits access to health professionals, but is otherwise valid, & the Sec. is directed to adopt a rule permitting access by employees & their collective bargaining representatives. All the above in accordance with the opinion of this Court. filed (cvs 83-3554 83-3561 83-3565 84-3066 84-3093 & 84-3128) (sa)

\* \* \* \* \*

1987

Jan. 27

Mot. by petitioners requesting that this Ct. dir. the Sec., within two weeks of this Ct.'s action, (a) to order extension of the Hazard Communication Standard to all employers cvd. by the OSH Act — & to set the effective date of the amendment no more than ninety days after its announcement, *see* 29 U.S.C. § 655(b)(4) — or (b) to state why such extension is infeasible. In addition, petitioners ask the Ct. to hold the Sec. in civil contempt for failing to comply with the Ct.'s earlier judgment. In view of the importance of this case and the issues raised by the instant mot., petitioners further request that the Ct. schedule oral argument on petitioners' mot.

## DATE

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w/serv. filed (cvs. 83-3554, 83-3561, 83-3565, 84-3066, 84-3093 & 84-3128) (sa)

\* \* \* \* \*

Mar. 23

Heard on pet. of United Steelworkers of America for further relief w/respect to prior dec. of this Court. Coram: Gibbons, ChJ, Fisher & Kelly, DJ At the hearing cnsl for resp. requested permission to have transcript prepared of oral argmt. & Ct. granted permission. (Cvs. 83-3554, 3561, 3565, 84-3066, 3093 & 3128) (ab)

\* \* \* \* \*

May 29

Opinion of the Court (*Gibbons*, Chief Judge Fisher, Chief Judge\* and Kelly, District Judge\*\*) filed (cvs. 83-3554, etc.) \*Hon. Clarkson S. Fisher, Chief Judge; U.S. Dist. Ct. for the Dist. of NJ sitting by designation.\*\* Hon. James M. Kelly, U.S. Dist. Ct. Judge for the Eastern District of PA sitting by designation. (sa)

May 29

Orders granting the mot. which has been treated as a pet. for review for further relief with respect to this Ct's prior dec. in *United Steelworkers v. Aucher*, 763 F.2d 728 (3d Cir. 1985) and the Sec. is directed, within 60 days frm. the date of this order to publish in the Fed. Register a hazard communication standard applicable to all wrks. cvd. by the OS & H Act of 1970, including those which have not been cvd. in the hazard communication standard as presently written, or a statement of reasons why, on the basis of

## DATE

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the present administrative rec., a hazard communication standard is not feasible. Further ordering that if such a statement of reasons is fld. reasons shall be supplied separately as to each category of excluded workers. Denying at this time the petition insofar as petitioners seek to have the respondents held in contempt. (cvs 83-3554, etc.) (sa)

\* \* \* \* \*

Jul 23 Emergency Motion by Secretary of Labor to Stay Further Proceedings, filed. w/service. (cvs. 83-554, etc.) (ch)

\* \* \* \* \*

Aug 12 Order (*Gibbons*, Chief Judge and Fisher and Kelly, District Judges) denying Emergency mot. by Sec. of Labor to stay further proceedings. fld. (cvs 83-3554, etc.) (sa)

\* \* \* \* \*

Aug 31 Certified judgment in lieu of a formal mandate issued fld (cvs. 83-3554, etc.

\* \* \* \* \*

1988

Apr. 6 Mot. by petitioners for further relief w/respect to prior dec. of this Ct. & points and authorities in support thereof. w/serv fld (cvs 83-3554 etc

Apr. 6 Mot. by petitioners to add James C. Miller III, Dir. Office of management and budget as respondent. (Covs. 83-3554, ect.) filed w/serv. (sa)

## DATE

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Aug. 10 Submitted on motion for further relief. Coram: *Gibbons*, Ch.J., Fisher & Kelly, DJ (covers 83-3554, 3561, 3565 & 84-3066, 3093 & 3128) (ab)

Aug. 19 Opinion of The Court (*Gibbons*, Chief Fisher\* and Kelly\* District Judges) sitting by designation. filed (cvs. 83-3554, etc.) (sa)

Aug. 19 Order (*Gibbons*, Chief Judge Fisher & Kelly, District Judges\*) Denying mot for a stay of hazard communication standard pending resolution of pet. for review etc. Petition for review denied for the reasons set forth in opn. addressing the mot. of U.S. Steelworkers of America, etc. for further relief. filed (cvs 83-3554, etc.) \*Sitting by designation. (sa)

Aug. 19 Order ordering & adjudging by this Ct. that Sec. shall forthwith publish in the Fed. Register a notice that those parts of the 8/24/87 hazard communication standard which were disapproved by Off. Management, are now effective. Denying petitioners' mot. to hold resp. officials of the Dept. of Labor in contempt since the instant dispute arose as the result of another Federal Agency's attempt to exceed its statutory authority. (cvs 83-3554, etc) fld

\* \* \* \* \*

Sept. 2 Petition for reh'g. before the Court In Banc by respondent, John A. Pendergrass w/serv. filed (cvs. 83-3554, etc.) filed (sa)

DATE	FILINGS—PROCEEDINGS
Sept. 2	Petition for reh. before the Court In Banc by Intervenor, United Technologies w/serv. filed (cvs. 83-3554, etc.) filed (sa)
	* * * * *
Nov. 28	Order ( <i>Gibbons</i> Chief Judge Stapleton Mansmann Greenberg Hutchinson Scirica and Cowen Circuit Judges Fisher and Kelly District Judges*) denying the petition for reh. by respondent before the Court In Banc (cvs. 83-3554, etc.) filed "As to panel reh. only (sa)
Nov. 28	Order ( <i>Gibbons</i> , Chief Judge Stapleton Mansmann Greenberg Hutchinson Scirica and Cowen Circuit Judges Fisher & Kelly District Judge*) denying the petition for reh. by intervenor, United Technologies before the Ct. In Banc. (cvs. 83-3554, etc. filed "As to panel reh. only (sa)
Dec. 5	Mot. by respondent Pendergrass to stay mandate to 1/5/89, w/serv. fld (cvs. 83-3554, etc.) as
Dec. 5	Mot. by Associated General Contractors counsel for petitioners to stay mandate w/serv. filed to 1-5-89 (cvs. 83-3554, etc. & 88-3345/8) sa

\* \* \* \* \*

1989

Jan. 17	Copy of Supreme Court Order dated 1/13/89 by Justice Brennan ordering that the mandates of the U.S. Court of Appeals for the 3rd Cir. Nos. 83-3554, et al. and 88-3345, 88-3347 and 88-3348 set to issue 1-13-89 are
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DATE	FILINGS—PROCEEDINGS
	hereby stayed pending receipt of responses to the applicaiton due on Monday 1-23-89 and further order of the undersigned or of the Ct. Filed (cvs. 83-3554, et al. 88-3345/8) sa
Jan. 17	Order ( <i>Gibbons</i> , Chief Judge Scirica and Aldisert Cir. Judges) the mot. to stay the mandate is denied. The remaining pending mots. are moot. (cvs. 83-3554, et a 88-3345/8) filed (sa)
Jan. 30	Certified Copy of S.C. Order by Justice Brennan entered 1/13/89 staying U.S. Court of Appeals mandates is vacated & application in all respects is denied. Fld.S.C. Nos. 88-1070 & 88-1075 (cvs. 83-3554, et al. 88-3345, 88-3347/8) sa
Jan. 30	Certified judgment issued in lieu of a formal mandate (cvs. 83-3554, et al) sa

The Department of Labor's Hazard Communication Standard  
(29 C.F.R. 1910.1200)

§ 1910.1200 Hazard communication.

(a) *Purpose.* (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

(2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

(b) *Scope and application.* (1) This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers.

(2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

(3) This section applies to laboratories only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible to laboratory employees; and,

(iii) Employers shall ensure that laboratory employees are apprised of the hazards of the chemicals in their workplaces in accordance with paragraph (h) of this section.

(4) In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:

(i) Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain copies of any material safety data sheets that are received with incoming ship-

ments of the sealed containers of hazardous chemicals, shall obtain a material safety data sheet for sealed containers of hazardous chemicals received without a material safety data sheet if an employee requests the material safety data sheet, and shall ensure that the material safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,

(iii) Employers shall ensure that employees are provided with information and training in accordance with paragraph (h) of this section (except for the location and availability of the written hazard communication program under paragraph (h)(1)(iii)), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container.

(5) This section does not require labeling of the following chemicals:

(i) Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

(ii) Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device, including materials intended for use as ingredients in such products (e.g. flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) and regulations issued under that Act, when they are subject to the labeling requirements under that Act by the Food and Drug Administration;

(iii) Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. 201 *et seq.*) and regulations issued under that Act, when subject to the labeling requirements of that

Act and labeling regulations issued under that Act by the Bureau of Alcohol Tobacco, and Firearms; and,

(iv) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission.

(6) This section does not apply to:

(i) Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 *et seq.*), when subject to regulations issued under that Act by the Environmental Protection Agency;

(ii) Tobacco or tobacco products;

(iii) Wood or wood products;

(iv) Articles;

(v) Food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers;

(vi) Foods, drugs, or cosmetics intended for personal consumption by employees while in the workplace;

(vii) Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers; and,

(viii) Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*),

when it is in solid, final form for direct administration to the patient (i.e. tablets or pills).

(c) *Definitions.*

"Article" means a manufactured item: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical, under normal conditions of use.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"Chemical" means any element, chemical compound or mixture of elements and/or compounds.

"Chemical manufacturer" means an employer with a workplace where chemical(s) are produced for use or distribution.

"Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

"Combustible liquid" means any liquid having a flash-point at or above 100°F (37.8°C), but below 200°F (93.3°C), except any mixture having components with flashpoints of 200°F (93.3°C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

"Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"Compressed gas" means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70°F (21.1°C); or

(ii) a gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130°F (54.4°C) regardless of the pressure at 70°F (21.1°C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100°F (37.8°C) as determined by ASTM D-323-72.

"Container" means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems, and engines, fuel tanks, or other operating systems in a vehicle, are not considered to be containers.

"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Distributor" means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers.

"Employee" means a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies. Workers such as office workers or bank tellers who encounter hazardous chemicals only in non-routine, isolated instances are not covered.

"Employer" means a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution, including a contractor or subcontractor.

"Explosive" means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

"Exposure" or "exposed" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes potential (e.g. accidental or possible) exposure.

"Flammable" means a chemical that falls into one of the following categories:

(i) "Aerosol, flammable" means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) "Gas, flammable" means:

(A) A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iii) "Liquid, flammable" means any liquid having a flashpoint below 100°F (37.8°C), except any mixture having components with flashpoints of 100°F (37.8°C) or higher, the total of which make up 99 percent or more of the total volume of the mixture;

(iv) "Solid, flammable" means a solid, other than a blasting agent or explosive as defined in § 190.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and

persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

"Flashpoint" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (See American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D 93-79)) for liquids with a viscosity equal to or greater than 45 SUS at 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTMD 3278-78))

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

"Foreseeable emergency" means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.

"Hazardous chemical" means any chemical which is a physical hazard or a health hazard.

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the hazard(s) of the chemical(s) in the container(s).

"Health hazard" means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

"Identity" means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

"Immediate use" means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

"Importer" means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or employers within the United States.

"Label" means any written, printed, or graphic material, displayed on or affixed to containers of hazardous chemicals.

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

"Mixture" means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

"Organic peroxide" means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

"Oxidizer" means a chemical other than a blasting agent or explosive as defined in § 1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

"Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

"Produce" means to manufacture, process, formulate, or repackage.

"Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130°F (54.4°C) or below.

"Responsible party" means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

"Specific chemical identity" means the chemical name, Chemical Abstracts Service (CAS) Registry Number, or

any other information that reveals the precise chemical designation of the substance.

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

"Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

"Use" means to package, handle, react, or transfer.

"Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

"Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

"Workplace" means an establishment, job site, or project, at one geographical location containing one or more work areas.

(d) *Hazard determination.* (1) Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

(2) Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study con-

ducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

(3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

(i) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

(ii) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition).

The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.

(4) Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

(i) National Toxicology Program (NTP), *Annual Report on Carcinogens* (latest edition);

(ii) International Agency for Research on Cancer (IARC) *Monographs* (latest editions); or

(iii) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

Note: The *Registry of Toxic Effects of Chemical Substances* published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

(5) The chemical manufacturer, importer or employer shall determine the hazards of mixtures of chemicals as follows:

(i) If a mixture has been tested as a whole to determine its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

(ii) If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

(iii) If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard; the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and;

(iv) If the chemical manufacturer, importer, or employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees in those concentrations, the mixture shall be assumed to present the same hazard.

(6) Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the work place, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

(2) *Multi-employer workplaces.* Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:

(i) The methods the employer will use to provide the other employer(s) with a copy of the material safety data,

sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;

(ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

(iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

(3) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

(4) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.20(e).

(f) *Labels and other forms of warning.* (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

- (i) Identity of the hazardous chemical(s);
- (ii) Appropriate hazard warnings; and
- (iii) Name and address of the chemical manufacturer, importer, or other responsible party.

(2) For solid metal (such as a steel beam or a metal casting) that is not exempted as an article due to its downstream use, the required label may be transmitted to the customer at the time of the initial shipment, and need not be included with subsequent shipments to the same employer unless the information on the label changes. The

label may be transmitted with the initial shipment itself, or with the material safety data sheet that is to be provided prior to or at the time of the first shipment. This exception to requiring labels on every container of hazardous chemicals is only for the solid metal itself and does not apply to hazardous chemicals used in conjunction with, or known to be present with, the metal and to which employees handling the metal may be exposed (for example, cutting fluids or lubricants).

(3) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*) and regulations issued under that Act by the Department of Transportation.

(4) If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

(5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

- (i) Identity of the hazardous chemical(s) contained therein; and
- (ii) Appropriate hazard warnings.

(6) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5)

of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

(7) The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

(8) The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required information.

(9) The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

(10) The chemical manufacturer, importer, distributor or employer need not affix new labels to comply with this section if existing labels already convey the required information.

(g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

(2) Each material safety data sheet shall be in English and shall contain at least the following information:

(i) The identity used on the label, and, except as provided for in paragraph (i) of this section on trade secrets:

(A) If the hazardous chemical is a single substance, its chemical and common name(s);

(B) If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

(C) If the hazardous chemical is a mixture which has not been tested as a whole:

(1) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d)(4) of this section shall be listed if the concentrations are 0.1% or greater; and,

(2) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise less than 1% (0.1% for carcinogens) of the mixture, if there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees; and,

(3) The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

(ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

(iii) The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

(v) The primary route(s) of entry;

(vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used

or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

(vii) Whether the hazardous chemical is listed in the National Toxicology Program (NTP) *Annual Report on Carcinogens* (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) *Monographs* (latest editions), or by OSHA;

(viii) Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

(x) Emergency and first aid procedures;

(xi) The date of preparation of the material safety data sheet or the last change to it; and,

(xii) The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

(3) If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

(4) Where complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

(5) The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the information recorded accurately reflects the scientific evidence used in making the hazard determination. If the chemical manufacturer, importer or employer preparing the material safety data sheet becomes newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

(6) Chemical manufacturers or importers shall ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated. The chemical manufacturer or importer shall either provide material safety data sheets with the shipped containers or send them to the employer prior to or at the time of the shipment. If the material safety data sheet is not provided with a shipment that has been labeled as a hazardous chemical, the employer shall obtain one from the chemical manufacturer, importer, or distributor as soon as possible.

(7) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers. Retail distributors which sell

hazardous chemicals to commercial customers shall provide a material safety data sheet to such employers upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available. Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors which have informed them that the retail distributor does not sell the product to commercial customers or open the sealed container to use it in their own workplaces.

(8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in the their work area(s).

(9) Where employees must travel between workplaces during a workshift, *i.e.*, their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

(10) Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided for each hazardous chemical, and is readily accessible during each work shift to employees when they are in in their work area(s).

(11) Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.20 (e). The Director shall

also be given access to material safety data sheets in the same manner.

(h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

(1) *Information.* Employees shall be informed of:

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

(2) *Training.* Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

(i) *Trade secrets.* (1) The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

(i) The claim that the information withheld is a trade secret can be supported;

(ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this paragraph.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need of a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i)(3) and (4) of this section, as soon as circumstances permit.

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e. physician, industrial hygienist,

toxicologist, epidemiologist, or occupational health nurse) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(i) The request is in writing;

(ii) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(A) To assess the hazards of the chemicals to which employees will be exposed;

(B) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(C) To conduct pre-assignment or periodic medical surveillance of exposed employees;

(D) To provide medical treatment to exposed employees;

(E) To select or assess appropriate personal protective equipment for exposed employees;

(F) To design or assess engineering controls or other protective measures for exposed employees; and,

(G) To conduct studies to determine the health effects of exposure.

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

(A) The properties and effects of the chemical;

(B) Measures for controlling workers' exposure to the chemical;

(C) Methods of monitoring and analyzing worker exposure to the chemical; and,

(D) Methods of diagnosing and treating harmful exposures to the chemical;

(iv) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

(v) The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized by paragraph (i)(3)(iv) of this section:

(i) May restrict the use of the information to the health purposes indicated in the written statement of need;

(ii) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

(iii) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

(i) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

(ii) Be in writing;

(iii) Include evidence to support the claim that the specific chemical identity is a trade secret;

(iv) State the specific reasons why the request is being denied; and,

(v) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

(8) The health professional, employee, or designated representative whose request for information is denied under paragraph (i)(3) of this section may refer the request and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

(i) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

(ii) The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information; and,

(iii) The health professional, employee, or designated representative has demonstrated adequate means to protect the confidentiality.

(10)(i) If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is

not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

(ii) If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(11) If a citation for a failure to release specific chemical identity information is contested by the chemical manufacturer, importer, or employer, the matter will be adjudicated before the Occupational Safety and Health Review Commission in accordance with the Act's enforcement scheme and the applicable Commission rules of procedure. In accordance with the Commission rules, when a chemical manufacturer, importer, or employer continues to withhold the information during the contest, the Administrative Law Judge may review the citation and supporting documentation *in camera* or issue appropriate orders to protect the confidentiality or such matters.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical

manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is a trade secret.

(j) *Effective dates.* (1) Chemical manufacturers, importers, and distributors shall ensure that material safety data sheets are provided with the next shipment of hazardous chemicals to employers after September 23, 1987.

(2) Employers in the non-manufacturing sector shall be in compliance with all provisions of this section by May 23, 1988. (Note: Employers in the manufacturing sector (SIC Codes 20 through 39) are already required to be in compliance with this section.)

Excerpts From "Hazard Communication: Notice of Proposed  
Rulemaking" (47 Fed. Reg. 12,092 (Mar. 19, 1982))

**DEPARTMENT OF LABOR**

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-022]

Hazard Communication; Notice of Proposed  
Rulemaking and Public Hearings

**AGENCY:** Occupational Safety and Health  
Administration, Labor.

**ACTION:** Notice of proposed rulemaking  
and public hearings.

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**SUMMARY:** The proposed standard requires chemical manufacturers to assess the hazards of chemicals which they produce, and all employers having facilities in the manufacturing division, SIC Codes 20-39, to provide information to their employees about these hazards by means of hazard communication programs including labels, placards, material safety data sheets, information and training, and access to written records. OSHA has determined that this standard is necessary because many employers and employees are not aware of the presence of hazardous chemicals in their workplaces. The proposed standard provides for hazard determinations to be conducted to identify these hazards, and for subsequent communication to employees of the hazards thus identified. These activities should serve to alleviate the lack of awareness concerning hazardous chemicals, and should provide an impetus for employees and employers to devise better means of protection from these hazards. Public hearings are being scheduled to provide interested parties

the opportunity to orally present information and data related to the issues raised by this proposed rule.

\* \* \* \* \*

[T]he current proposal substantially reduces the documentation necessary on hazard evaluation procedures as well as other recordkeeping requirements. As a result, the initial recordkeeping cost is lowered from \$31.35 million projected for the January proposal to \$14.7 million under the current proposal. The annual cost of recordkeeping likewise falls from \$4.69 million to \$2.07 million. This provision—together with more limited labeling and the elimination of "no hazard" certifications, information sheets, and labeling requirements on pipes and support systems—significantly reduces the paperwork burden imposed by the January proposal and meets the intent of the Paperwork Reduction Act of 1980.

\* \* \* \* \*

Excerpts From "Hazard Communication: Final Rule"  
(48 Fed. Reg. 53,280 (Nov. 25, 1983))

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1910**

**Hazard Communication**

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Final rule.

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**SUMMARY:** OSHA is hereby promulgating a final occupational safety and health standard entitled "Hazard Communication" (29 CFR 1910.1200). The standard requires chemical manufacturers and importers to assess the hazards of chemicals which they produce or import, and all employers having workplaces in the manufacturing division, Standard Industrial Classification (SIC) codes 20 through 39, to provide information to their employees concerning hazardous chemicals by means of hazard communication programs including labels, material safety data sheets, training, and access to written records. In addition, distributors of hazardous chemicals are required to ensure that containers they distribute are properly labeled, and that a material safety data sheet is provided to their customers in the manufacturing division SIC Codes.

Implementation of this final standard will reduce the incidence of chemically-related occupational illnesses and injuries in employees of the manufacturing division. Increased availability of hazard information will assist employers in these industries to devise appropriate protective measures, and will give employees the information they need to take steps to protect themselves.

The twenty-four states with their own OSHA-approved occupational safety and health plans must adopt a comparable standard within six months of this publication date. These states are: Alaska, Arizona, California, Connecticut (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a state standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate, in these states.

\* \* \* \* \*

**SUPPLEMENTARY INFORMATION:** The recordkeeping requirements in the standard have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. 3501, *et seq.* The OMB approval number is 1218-0072.

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Excerpts From "Hazard Communication: Final Rule"  
(52 Fed. Reg. 31,853 (Aug. 24, 1987))

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910, 1915, 1917, 1918, 1926, and 1928

[Docket No. H-0220]

Hazard Communication

AGENCY: Occupational Safety and Health  
Administration (OSHA); Labor.

ACTION: Final rule.

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**SUMMARY:** OSHA is revising its Hazard Communication Standard (HCS) (29 CFR 1910.1200), which currently applies to the manufacturing sector, to cover all employers with employees exposed to hazardous chemicals in their workplaces. Expansion of the scope of the HCS requires non-manufacturing employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs. This action will reduce the incidence of chemically-related occupational illnesses and injuries in non-manufacturing workplaces.

\* \* \* \* \*

*Labeling exemptions.* The HCS includes a number of labeling exemptions to ensure that OSHA does not provide duplicative coverage for products which are already labeled under the rules of another Federal agency. It should be reemphasized that these exemptions (in paragraph (b)(4) of the original rule; paragraph (b)(5) in this final rule) are only from the container labeling requirements under paragraph (f) — all other provisions of

the rule are still in effect. A minor correction is being made, however, to these exemptions to indicate that when medical or veterinary devices are labeled in accordance with the labeling requirements of the Food and Drug Administration (FDA) under authority of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), those items are exempted from HCS labeling requirements. All other items regulated by FDA under that Act were listed in the HCS labeling exemption. Medical and veterinary devices were inadvertently omitted from the list of items that might be subject to FDA labeling requirements under the Federal Food, Drug, and Cosmetic Act, and they are exempted from HCS labels for the same reasons that the other items are exempt when subject to labeling under FDA. See 48 FR 53289. To ensure that all these FDA regulated items are treated in the same manner and that devices are exempted from HCS labeling if subject to FDA labeling, paragraph (b)(5)(ii) is amended by adding medical and veterinary devices.

*Other exemptions.* The HCS includes a number of specific, total exemptions from the requirements of the rule for certain types of chemicals. This rule adds three categories of exemptions: food, drugs, cosmetics, or alcoholic beverages in a retail establishment packaged for retail sale (paragraph (b)(6)(vi)); consumer products (paragraph (b)(6)(vii)); and certain pharmaceuticals (paragraph (b)(6)(viii)).

*Food, drugs, cosmetics, alcoholic beverages.* The current HCS includes an exemption for food, drugs, or cosmetics brought into the workplace for employee consumption. These types of exposures are not related to an employee's work, and therefore do not need to be covered under the HCS.

The expansion of the HCS into the non-manufacturing sector will result in many of these types of products being

present in workplaces (e.g., liquor stores) where they are not intended for employee consumption, and where they normally would not result in employee exposure because they are packaged for sale to consumers. Although some of these products may meet the definition of a "hazardous chemical" (e.g., vinegar is acetic acid), when packaged for retail sale they do not pose a hazard to workers that is any different than the hazards of such products in their homes. The label information required by other Federal agencies for foods, drugs, cosmetics, and alcoholic beverages should thus provide sufficient protection for workers, and OSHA has exempted these products from coverage under the rule. It should be noted that this is not an exemption for facilities of any particular industry, as all facilities may have other chemicals in use that would be covered by the HCS. In addition, since these products are exempted, employers which package them for retail sale would not have to furnish material safety data sheets to distributors receiving the products.

*Consumer products.* The current rule provides a labeling exemption for consumer products when they are labeled in accordance with the requirements of the Consumer Product Safety Commission (CPSC). CPSC requires consumer products which contain hazardous substance to be appropriately labeled. Examples of consumer products would include such items as oven cleaner, paint stripper, and adhesive, which may be found in various types of workplaces. In addition to the specific labeling exemption, OSHA has been interpreting the rule as not being applicable to consumer products when used as a consumer would use them. OSHA is now adding this interpretation to the rule itself, paragraph (b)(6)(vi), stating that where such consumer products are used in the workplace in a manner comparable to normal conditions of consumer use, resulting in a duration and frequency of exposure to employees which is no greater than exposures experienced

by ordinary consumers, under such conditions the chemical would not have to be included in the employer's hazard communication program. This position is consistent with OSHA's reason for originally limiting the exemption for hazardous consumer products used in the course of employment to only an exemption from HCS labeling, and not material safety data sheet and training requirements. "OSHA recognizes . . . that there may be situations where worker exposure is significantly greater than that of consumers, and that under these circumstances, substances which are safe for contemplated consumer use may pose unique hazards in the workplace." 48 FR 53289. However, to the extent that workers are exposed to the substances in a manner similar to that of the general public, there is no need for any HCS requirements.

One example of such a differentiation in exposure situations involves the use of abrasive cleaners in the workplace. Where these are used intermittently to clean a sink, much as they would be used at home, the cleaners would not be covered under the standard. But if they are used to clean out reactor vessels, thus resulting in a much greater level of exposure, they would be covered. Or if an employee cleans sinks all day long, thus resulting in more frequent exposures, the abrasive would also be included in the hazard communication program. Thus workplaces which only have chemicals which are consumer products used in the same way and as frequently as the general public would normally use them, would not have to have a hazard communication program.

It should be noted that OSHA intends to read this exemption narrowly. Where an employer is uncertain whether the duration and frequency of exposure in these products is comparable to consumer use, an employer should obtain or develop the material safety data sheet and make it available to employees.

In response to questions raised in the 1985 ANPR, OSHA received a few comments on the use of consumer products in the non-manufacturing sector. A number indicated that overexposure may occur from the use of such products, or that the frequency and duration of workplace exposure is typically greater than that experienced by consumers (Exs. 2-59, 2-83, 2-100, 2-120, and 2-164). Others stated that the exposure was comparable to consumer use (Exs. 2-46 and 2-63). There were several that felt the label provided enough information, and no additional requirements were needed to protect employees (Exs. 2-75, 2-79, 2-99, 2-107, and 2-116), while others felt the employer should be required to request material safety data sheets because employees are not getting enough information (Exs. 2-109, 2-128, and 2-169). One suggested that the label note that a material safety data sheet is available on request (Ex. 2-100), while another contended that when a product is used by a professional, it is no longer a consumer product (Ex. 2-199). OSHA believes that the consumer product exemption in this final rule takes all of these concerns into consideration, and strikes a balance between the practical consideration of acquiring and maintaining material safety data sheets on CPSC regulated products which employees are exposed to at home as well as at work, and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate.

A number of States adopting right-to-work laws have also developed consumer product exemptions. (See, e.g., Wisconsin "Employees' Right to Know Law"; Illinois "Toxic Substances Disclosure to Employees Act.") However, most of these rules have taken a broader approach to the consumer product exemption, generally eliminating coverage of such products unless exposure is

"significantly greater" than consumer exposure during the "principal consumer use." OSHA considered and rejected such language for the consumer product exemption. It would be very difficult from an enforcement perspective to determine when exposure to a consumer product is "significantly greater" than consumer exposure. The key elements of concern to OSHA are as stated in the consumer product exemption included in this rule—that the consumer product be used in the same manner as a consumer would use it (and therefore as intended by the manufacturer when preparing the label information), and that the duration and frequency of exposure be essentially the same as would be experienced by a consumer (and thus the label warnings would provide adequate protection.) A broader exemption than this would not be appropriate to protect workers from occupational exposures that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed.

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*Medicine.* The rule, paragraph (b)(6)(vii), also includes an exemption for drugs when they are solid, and are in final form for direct administration to the patient (*i.e.*, pills or tablets). Employees handling such finished drug products would not be exposed to the chemicals involved, and would not need information other than that supplied on the container label under FDA requirements. (The State of North Carolina adopted a similar exemption in their Hazard Communication Standard, 13 NCAC s7C.101(a)(99)).

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*(e) Written Hazard Communication Program*

Under the current rule, a written hazard communication program must be developed and implemented for each

workplace. Since the current rule covers fixed manufacturing sites, it did not appear to be necessary to specifically state that the written program be available at the site. With expansion to non-manufacturing, however, particularly in the construction industry where a firm may have multiple sites, the standard must be tailored to specifically state that the intent is to maintain the written program at each site. Employees will then be able to access the information as required.

The current written hazard communication program requirements include a provision that requires manufacturing employers to provide hazard information to on-site contractor employers who have employees who may be exposed to the hazards generated by the manufacturer (current paragraph (e)(1)(iii)). The current standard does not address the reverse situation, *i.e.*, where a contractor employer brings hazardous materials on-site, and exposes the manufacturer's employees to them. Since the expanded rule will affect more worksites with work arrangements of this type (*e.g.*, construction), and the need for an exchange of hazard information is obvious, OSHA has revised the requirements to tailor it to address the multi-employer workplace. (This was suggested in comments submitted in response to the ANPR. *See* Ex. 2-225, comments from the National Constructors Association. In addition, this situation has also been addressed in existing State right-to-know laws. *See, e.g.*, Alabama Act 85-658; Tennessee "Hazardous Chemical Right to Know Law.")

Under these provisions (paragraph (e)(2)), the employers must exchange material safety data sheets, as well as information about precautionary measures necessary to protect employees and an indication of the type of labeling system in use, where exposures may occur to another employer's employees. Each employer will then have the information necessary to inform and train their

employees. This will help ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical.

Consistent with the performance-orientation of the rule, the provisions do not specify how this coordination is to be accomplished. This is best left to the discretion of the parties involved. In many cases, it would probably be most efficient for the general contractor to coordinate the function. For example, the general contractor could keep and make available material safety data sheets in the office on the site.

It should be emphasized that the exchange of information is limited to those situations where exposures of other employers' employees may occur. Given the nature of multi-employer work sites in construction, there would be many situations where subcontractors responsible for various phases of the building project would not have employees present during other phases and thus no such exchange would be required. For example, if the electricians are not working near, or at the same time as, the paving contractor, then no interchange is required. But if a painting contractor's workers are using flammable solvents in an area where another subcontractor is welding pipes, this information exchange is vital to ensure proper protection of employees.

\* \* \* \* \*

#### IV. Clearance of Information Collection Requirements

On March 31, 1983, the Office of Management and Budget (OMB) published a new 5 CFR Part 1320, implementing the information collection provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (48 FR 13666). Part 1320, which became effective on

April 30, 1983, sets forth procedures for agencies to follow in obtaining OMB clearance for information collection requirements. The sections of the Hazard Communication Standard which may create recordkeeping requirements are paragraphs (d) hazard determination; (e) written hazard communication program; (f) labels and other appropriate forms of warning; (g) material safety data sheets; (h) information and training; and (i) trade secrets.

In accordance with the provisions of the Paperwork Reduction Act and the regulations issued pursuant thereto, OSHA certifies that it has submitted the information collection requirements contained in its rule on hazard communication to OMB for review under section 3504(h) of that Act.

\* \* \* \* \*

**Excerpts From "Hazard Communication: Notice of Proposed Rulemaking" (53 Fed. Reg. 29,822 (Aug. 8, 1988))**

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1910, 1915, 1917, 1918, and 1926**

**[Docket H-022D]**

**Hazard Communication**

**AGENCY:** Occupational Safety and Health Administration (OSHA); Labor.

**ACTION:** Notice of proposed rulemaking (NPRM) and notice of public hearing.

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**SUMMARY:** On August 24, 1987, OSHA published a final rule to modify its Hazard Communication Standard (HCS) (52 FR 31852). The original rule, which was promulgated on November 25, 1983, covered employees exposed to hazardous chemicals in the manufacturing sector of industry. The modified rule expanded coverage to all employees exposed to hazardous chemicals, thus providing protection for those in non-manufacturing employments as well as manufacturing.

The HCS requires employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs. Implementation of these hazard communication programs will reduce the incidence of chemically-related occupational illnesses and injuries.

An advance notice of proposed rulemaking (ANPR) on expansion of the scope had been published on November 27, 1985 (50 FR 48794). OSHA was subsequently directed by the U.S. Court of Appeals for the Third Circuit to issue

a final standard to expand the scope of industries covered by the rule within sixty days of its decision issued on May 29, 1987, *United Steelworkers of America, AFL-CIO-CLC v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987), unless the Agency could demonstrate that such an expansion would not be feasible. The August final rule was OSHA's response to the Court's direction. However, the Agency recognized that had the standard been developed through a more complete rulemaking process, additional information regarding the feasibility or practicality of the provisions may have been included in the record. OSHA therefore established a sixty-day comment period on the final rule to permit interested parties to provide data or evidence regarding the feasibility or practicality of the provisions of the rule.

This NPRM proposes modifications to the final rule based upon information submitted to the rulemaking record, including a determination made by the Office of Management and Budget (OMB) under the Paperwork Reduction Act regarding the information collection requirements of the final rule. OSDA is inviting comment for sixty (60) days following publication of this NPRM, and is scheduling a public hearing to provide an opportunity for additional input.

\* \* \* \* \*

#### 1. History of OSHA's Hazard Communication Standard

The development of OSHA's Hazard Communication Standard (HCS) was initiated in 1974. The process has been lengthy and is discussed in detail in the preambles to both the original and revised final rules (see 48 FR 53280-81 and 52 FR 31852-54). This discussion will focus on the sequence of events which have occurred since the original final rule was filed at the Federal Register in 1983.

Petitions for judicial review of the rule were filed in the U.S. Court of Appeals for the Third Circuit (hereinafter referred to as the "the Court" or "the Third Circuit") on November 22, 1983, by the United Steelworkers of America, AFL-CIO-CLC, and by Public Citizen, Inc., representing itself and a number of labor groups. Motions to intervene in these cases were received from the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit; the State of New York in the Second Circuit; the State of Illinois in the Seventh Circuit; the Flavor and Extract Manufacturers' Association in the Fourth Circuit; and the Fragrance Materials Association in the District of Columbia Circuit. These cases were subsequently transferred to the Third Circuit and consolidated into one proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association were withdrawn prior to filing briefs.

The Court issued its initial decision on the challenges to the rule on May 24, 1985 (*United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985)). (See Ex. 4-21.) The standard was upheld in most respects, but three issues were remanded to the Agency for reconsideration. The decision was not appealed.

First, the Court concluded that the definition of trade secrets incorporated by OSHA included chemical identity information that was readily discoverable through reverse engineering and, therefore, was "broader than the protection afforded trade secrets by state law." The Court directed the Secretary of Labor to reconsider a trade secret definition which would not include chemical identity information that is readily discoverable through reverse en-

gineering. Secondly, the Court held the trade secret access rule in the standard invalid insofar as it limited access to health professionals, but found the access rule otherwise valid. The Secretary was directed to adopt a rule permitting access by employees and their collective bargaining representatives to trade secret chemical identities. OSHA complied with the Court orders regarding the two trade secret issues in a separate rule, published in final form on September 30, 1986 (51 FR 34590). The revised trade secret provisions were incorporated into the text of the final rule published on August 24, 1987.

The third issue remanded to OSHA involved the scope of industries covered by the standard. The original HCS applied to employers and employees in the manufacturing sector. The Court directed the Secretary of Labor to reconsider the standard's application to employees in other industry sectors, and "to order its application in those sectors unless he can state reasons why such application would not be feasible." 763 F.2d at 739, 743.

OSHA subsequently published an advance notice of proposed rulemaking (ANPR) to collect comments and information on the expansion of the scope to cover these additional sectors (50 FR 48795; November 27, 1985). In particular, the Agency sought information on the extent employers in non-manufacturing industries have already implemented various aspects of a hazard communication program. In addition, OSHA wanted to obtain data regarding the applicability of the provisions as written in the original rule to these other sectors. A total of 226 responses were received. (See Ex. 2). OSHA also commissioned a study of the economic impact of extending the HCS to the fifty major non-manufacturing industry groups within its jurisdiction. (See Exs. 4-1 and 4-2.) Based on this newly acquired evidence, as well as the

previous rulemaking record, OSHA was in the process of drafting a proposed rule.

On January 27, 1987, however, the United Steelworkers of America, AFL-CIO-CLC and Public Citizen, Inc., petitioners in the 1985 challenge, filed a Motion For An Order Enforcing the Court's Judgment and Holding Respondent in Civil Contempt. Petitioners claimed that the Court's 1985 order had not authorized OSHA to embark on further fact gathering and that OSHA should have made a feasibility determination based upon the 1985 rulemaking record. Petitioners also argued that even if further fact gathering had been allowed by the Court's order, OSHA's pace was unduly slow.

In response, OSHA noted that the Court's 1985 order did not specify that OSHA should act on the then-existing record. OSHA believed that seeking further evidence on feasibility in nonmanufacturing was appropriate in light of its statutory obligation to issue rules that are well grounded in a factual record. OSHA also asserted that, consistent with Supreme Court precedent, the Agency should be permitted to exercise its discretion in determining the appropriate rulemaking procedures for complying with the Court's remand order. Lastily, the Agency argued that its schedule to complete the rulemaking was reasonable and did not constitute undue delay.

On May 29, 1987, the Court issued a decision holding that the Court's 1985 remand order required consideration of the feasibility of an expanded standard without further rulemaking. *United Steelworkers of America, AFL-CIO-CLC v. Pendergrass*. 819 F.2d 1263 (3d Cir. 1987). (See Ex. 4-20.) The Court declared that adequate notice had been provided to non-manufacturers during the original rulemaking that they might be covered by the HCS, *id.* at 1265-1266, 1269, that the answers to the remaining questions OSHA may have had regarding feasibility were "self-

evident" or "readily ascertainable" from the original record, *id.* at 1268-69, and that further fact finding was "unnecessary". *id.* at 1268. The Court ordered the Agency to issue, within 60 days of its order, "a hazard communication standard applicable to all workers covered by the OSHA Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible." *Id.* at 1270.

OSHA subsequently re-evaluated the evidence in the record and determined that a modified final rule covering all employers subject to the Act (*i.e.*, both manufacturing and nonmanufacturing) was both necessary and feasible. The Agency therefore issued the final rule on Hazard Communication which was published in the **Federal Register** on August 24, 1987.

The only modifications OSHA made to the original rule in the August revision were those that were related to expansion of the scope. If the Agency had been able to publish a NPRM at that point, it had planned to propose other modifications based upon the ANPR comments as well as OSHA's considerable experience in implementing the original rule, and the experience of OSHA-approved State Plan States in implementing the HCS in the non-manufacturing sector. Publication of a final rule precluded any actions other than those specifically required by the expansion, particularly since the Court determined that the record it reviewed (exhibits collected through November 1983) was a sufficient basis for the final rule. Thus evidence collected subsequent to that time was merely cited as additional substantiation for the expansion.

The revised final rule expanded the scope of industries covered from just the manufacturing sector to all industries where employees are exposed to hazardous chem-

icals. As OSHA stated at the time, the Agency has evidence to indicate that there is chemical exposure in every type of industry and thus employees in all industries must have protection under the rule. (See 52 FR 31858.)

As noted earlier, although the standard was issued as a final rule, OSHA invited interested parties to submit information, data or evidence regarding the feasibility or practicality of the provisions as written when applied to the non-manufacturing sector as well as any recommendations for further modification. A 60 day period was established for such comments, and it ended on October 23, 1987. A total of 136 comments were received (39 of them were received after the deadline), and entered into Docket H-022D. A variety of opinions were expressed in the comments regarding a number of issues, however, most of the comments did not contain data or evidence concerning either feasibility or practicality. Many of the comments were questions or requests for classification of the provisions.

OSHA is proposing some modifications it believes are appropriate to address concerns raised and clarify the requirements. The Agency is also providing clarification regarding other issues in this preamble discussion. The Agency is, of course, always prepared to respond to any specific questions from the regulated community regarding compliance. To this end, OSHA has appointed a Hazard Communication Coordinator in each Regional Office to whom such questions should be directed. Instructions to OSHA's compliance staff regarding enforcement of the HCS also include interpretations and many employers have found these documents to be useful to them in complying with the rule. These instructions are included in the docket as Ex. 4-24, and copies may be obtained from OSHA's Publication Officer, (202) 523-9667. A booklet summarizing the rule's provisions is also

available and may be used by employers in training workers regarding the requirements of the rule (the publication number is OSHA 3084 Revised).

In addition to the comments submitted to OSHA, the Office of Management and Budget (OMB) convened a public meeting under the Paperwork Reduction Act (44 U.S.C. Chapter 35) to address the information collection requirements of the expanded rule. The transcript of the OMB public meeting (which was held on October 16, 1987) is entered in the docket as comment 5-76, and other relevant documents (e.g., copies of statements, etc.) are entered in Exhibit 6. (In addition, the transcript of an April 2, 1987, public meeting on the information collection requirements for the manufacturing sector is Ex. 4-3). The majority of the participants in OMB's October 16 meeting submitted written comments to OSHA as well, so there is considerable duplication in Exhibit 6 of opinions that had already been expressed by the same parties in other parts of the rulemaking record.

In a letter sent to the Department of Labor on October 28, 1987, and subsequently published by OSHA in the **Federal Register** on December 4, 1987 (52 FR 46075) (Ex. 4-67), OMB, under the authority of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), disapproved certain information collection requirements in the expanded scope rule, as of the rule's effective date (May 23, 1988), based upon the record of the October 16 public meeting and the previous meeting on April 2, 1987 regarding the information collection requirements for the manufacturing sector, as well as OSHA's preamble to its August 24 rule and its justification submitted formally under the Paperwork Reduction Act. The October 28 letter stated that OMB disapproved: (1) The requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product that falls within the

"consumer products" exemption included in section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drugs regulated by the Food and Drug Administration in the non-manufacturing sector. In addition, OMB determined that OSHA should reopen the rulemaking on the HCS to consider alternatives to the definition of "article" which was included in both the original and revised final rules. Lastly, OMB conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industries to alleviate paperwork burdens and costs. For a complete description of OMB's rationale for these determinations, see the **Federal Register** notice of December 4, 1987 (52 FR 46075). This document will only summarize the positions taken by OMB.

On April 23, 1988, OMB extended its approval of all information collection requirements in the HCS through April 1991, except that OMB continued to disapprove the three provisions previously disapproved, 53 FR 15033. OMB's approval of the existing definition of "article" was limited to the clarification included in a January 14, 1988, letter from Assistant Secretary for Occupational Safety and Health John Pendergrass to OMB, which stated that "absent evidence that releases of such very small quantities could present a health hazard to employees, the article exception to the rule's requirements would apply." In response to commenters who requested that OMB not extend approval to any requirements in the non-manufacturing sector, OMB also stated:

The concerns of these commenters are largely based on the possibility that the standard and OMB's deci-

sion under the PRA will change dramatically as a result of the rulemaking. Although change is always possible, any such change would be fully considered during the rulemaking process. Of course, in order for OMB to grant PRA approvals, any changes must offer sufficient practical utility to justify any incremental paperwork burden they impose, including the burden of revising already-developed written programs. Moreover, as stated above, we are continuing to disapprove the previously-disapproved provisions; the rulemaking should of course conform the rule to these disapprovals.

In accordance with the Paperwork Reduction Act and the implementing regulations for that Act (5 CFR 1320.13(g) and 1320.14(f) and (g)), OSHA is reopening the rule on all of the issues raised by OMB in its letter in order to have an opportunity to fully discuss the complete current record on each item, as well as to collect additional data from the public. The issues and alternatives for dealing with them are described further below. OSHA is also proposing certain minor modifications, described below, and invites comment on them as well.

Regarding OMB's requirement that OSHA develop a plan to assist the regulated community with the paperwork associated with the HCS, the Agency is in the process of developing compliance assistance materials. These include OSHA 3084, a booklet explaining the provisions of the rule, and a compliance kit designed to help employers come into compliance. The compliance kit will be made available through the Government Printing Office within a few months. A press release will provide information about obtaining a copy at such time as it becomes available. For further information, please contact OSHA's Office of Information and Consumer Affairs, (202) 523-8151.

The revised final rule has been challenged in the U.S. Court of Appeals by the Associated Builders and Contractors, National Grain and Feed Association, Associated General Contractors of Virginia, Associated General Contractors of America, and United Technologies Corporation. A number of interested parties have intervened in these cases as well. The challenges are in the preliminary stages of adjudication at this point, and generally involve the appropriateness of OSHA's publishing a final rule in response to the Third Circuit's order.

Although these cases were originally consolidated in the U.S. Court of Appeals for the District of Columbia Circuit, they were transferred to the U.S. Court of Appeals for the Third Circuit on May 20, 1988. The cases were transferred to the Third Circuit because the "revised [HCS] was promulgated in response to orders by the Third Circuit \* \* \* and petitioners have raised issues similar to those already considered by that court."

On June 24, 1988, the Third Circuit granted a stay of the standard as it applies to the construction industry (29 CFR 1926.59) pending the outcome of the litigation challenging the rule. The rule is in effect for all other employers in both the manufacturing and nonmanufacturing sectors. OSHA published a notice in the **Federal Register** on July 22, 1988 (53 FR 27679) to provide affected employers further information regarding the applicability of the stay and enforcement of the rule.

In addition to these challenges of the revised HCS, the United Steelworkers of America, AFL-CIO-CLC, and Public Citizen have filed a motion with the Third Circuit requesting the court to order that OSHA enforce all of the revised HCS including the three requirements OMB disapproved under authority of the Paperwork Reduction Act. OSHA will continue to abide by the OMB decision and

will not enforce the disapproved requirements unless otherwise ordered by the Court.

*Advisory Committee on Construction Safety and Health (ACCSH)*. As discussed in the preamble to the August 1987 final rule (52 FR 31858-59), the ACCSH reviewed a draft notice of proposed rulemaking to expand the scope of the HCS to construction on June 23, 1987. The ACCSH went through the NPRM line-by-line, making recommendations to adapt it to construction industry, *i.e.*, the document with the recommended changes constituted an ACCSH recommended standard for hazard communication. A number of the recommendations were adopted (*e.g.*, the definition of workplace was modified to include job sites or projects; the written hazard communication program requirements were amended to clearly state that the programs are to be maintained at the site).

As this NPRM addresses issues that affect construction, OSHA transmitted a draft of it to the ACCSH for review and comment. In a meeting on March 30, 1988, the ACCSH did not provide specific recommendations on the NPRM. The ACCSH reiterated its desire to have a separate standard for construction, and appointed a subcommittee to make further recommendations to the Assistant Secretary. However, the ACCSH also reaffirmed that the standard as written should be implemented as scheduled on May 23, 1988.

The three primary issues in this NPRM that affect construction—the definition of “article,” the coverage of consumer products, and the maintenance of material safety data sheets on multi-employer worksites—were all previously considered by the ACCSH on June 23, 1987.

With regard to the definition of “article,” the ACCSH recommended that the definition state that vapors, mists, gases, and fumes are not to be considered articles (Tr. 97-8). As OSHA explained during the meeting, those types

of materials do not meet the definition in any event, and would not be considered articles. Thus there is no need for that particular modification. There were no further comments on the definition or its application to the construction industry during that meeting.

The ACCSH also reviewed OSHA's proposed exemption for consumer products, *i.e.*, that consumer products be exempt where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers. A motion was initially made to modify the exemption to allow consumer products used “as approved for consumer use, and which will not result in any duration or frequency of exposure which is greater than applicable threshold limit values for any hour of use.” Tr. 81. After further discussion regarding the lack of a mechanism for “approval” for consumer use that would apply in this situation, and the lack of threshold limit values for the majority of chemicals in the workplace, the ACCSH voted to approve an amended exemption which reads “where the employer can demonstrate it is used in the workplace in the same manner as recommended for consumer use, and which will not result in any duration and frequency of exposure, which is greater than exposures experienced by consumers.” Tr. 90.

The ACCSH also reviewed the requirement for maintenance of material safety data sheets on multi-employer worksites, and did not object to such a provision or indicate that it would be infeasible or unnecessary to have such a requirement. In fact, the committee further recommended that it be made explicit that written programs be maintained at the worksite, a recommendation that OSHA adopted.

## II. Summary and Explanation of the Issues and the Provisions of the Notice of Proposed Rulemaking

The regulatory text presented in this document only addresses the proposed modifications, rather than reprinting the entire standard and incorporating the proposed changes. Since the HCS is lengthy and complicated, OSHA believes that this will make it easier for interested parties to identify the proposed modifications and provide appropriate comment. When the final rule is promulgated, OSHA will reprint the entire text including the modified provisions.

The discussion which follows is also limited primarily to the proposed changes and related issues. It does not provide a complete summary and explanation of all of the provisions of the rule—for such information interested parties should refer to the preambles of the original (48 FR 53334-40) and revised (52 FR 31860-67) final rules. There are also discussions of alternatives to the proposed modifications which have been suggested to OSHA. OSHA is inviting comment on these as well as the regulatory text itself. While the purpose of this rulemaking is principally to resolve the issues presented by the proposed and alternative provisions, OSHA is also interested in receiving comment on other issues that may be related to the proposal. In order to assist OSHA in its development of the final HCS in the nonmanufacturing sector, comment will also be accepted and considered concerning the entire rule's application to the nonmanufacturing sector.

As most interested parties are aware, the rulemaking record on this standard is quite extensive, and all of the material submitted to date will be considered in development of the new final rule. It is therefore not necessary, or desirable, to repeat comments previously provided unless

there is new data, evidence or other information available concerning the arguments made.

In reopening the record, OSHA recognizes that it is not operating "on a clean slate." In developing the existing standard, OSHA had the benefit of an extensive evidentiary record. In addition, the Agency's experience gained under the original standard, as well as under State standards, some of which already applied to the nonmanufacturing sector, further supported OSHA's current standard. As explained in detail below, OSHA continues to believe that the record substantially justified the Agency's regulatory choices, and the information presented to OSHA after the standard was issued has, by and large, not convinced OSHA that significant changes are warranted to comply with the OSH Act.

In this rulemaking, OSHA is seeking additional information on whether these regulatory choices also meet the criteria of the Paperwork Reduction Act. If information collected in the course of this rulemaking responds to the concerns raised by OMB on these issues in its October 28, 1987, letter, OSHA will request that OMB reconsider its paperwork decision on these issues. OSHA will also consider requesting paperwork approval for other options substantially supported by the record, as well as conforming the final rule to OMB's paperwork decisions.

OMB has published implementing regulations at 5 CFR 1320.4(b) which state that, to obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that:

(1) The collection of information is the least burdensome for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and,

(3) The collection of information has practical utility. Commenters to the record should focus on these criteria in this rulemaking.

OSHA will fully comply with the Paperwork Reduction Act, which prohibits agencies from "conducting or sponsoring" a collection of information without OMB approval. Hence, the provisions disapproved by OMB will be neither effective nor enforceable until OSHA completes this rulemaking.

It should be noted, however, that OSHA retains "almost unlimited discretion to devise means to achieve the Congressionally mandated goal." *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1230 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). *Accord, Building and Construction Trades Dept., ALF-CIO v. Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988). The expectations of the manufacturing sector, which has been subject to the HCS since 1985, are settled, as are those of the nonmanufacturing sector, which has been preparing to comply with the present standard since August 1987, and with the paperwork requirements as approved by OMB since October 1987. Therefore, OSHA does not expect the standard to further change significantly unless the Agency is presented with substantial evidence that a regulatory modification is clearly necessary, either because the present standard is demonstrably infeasible in a specific respect, or because the proposed alternative would significantly increase the standard's intended safety and health benefit or significantly improve its cost-effectiveness. Employers must plan accordingly to fulfill their compliance obligations under the standard as it is currently approved and should not anticipate undue delay in its enforcement.

Comments submitted should clearly identify the provisions being addressed, the rationale for the position taken, and data or evidence in support of that rationale.

The discussion which follows is organized by paragraph of the standard for ease of reference. It is suggested that comments submitted be presented in the same fashion.

\* \* \* \* \*

*Food, drugs, cosmetics, and alcoholic beverages.* In the revised final rule, OSHA included an exemption for food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers (paragraph (b)(6)(v)). This exemption recognized that even where these chemicals are hazardous chemicals (and many are not, particularly in the area of food items), they present little or no hazard to employees when they are in final packaged form for sale to consumers. This exemption effectively limited coverage of many retail establishments which only have hazardous chemicals in this form, *i.e.*, packaged for sale to consumers. But it did not exempt these products when they are being used in a retail establishment and thus exposing employees—such as beauty products being used in a salon.

OSHA has received comments and questions about the application of this exemption from both businesses distributing to retail food establishments (*see*, Ex. 5-97) and the retail establishments themselves (*see*, Ex. 5-5). As stated in the preamble to the revised final rule, if a product is exempted downstream, a distributor has no responsibility for providing a MSDS on that product to the retail distributor. "In addition, since these products are exempted, employers which package them for retail sale would not have to furnish material safety data sheets to distributors receiving the products." 52 FR 31862.

OSHA is proposing a further modification to this exemption which both clarifies and extends it to other food and alcoholic beverage products in retail establishments which are being prepared for consumption by consumers.

Thus food which is used for cooking meals to be sold to customers would be exempt, as would alcoholic beverages which are sold by the glass and thus prepared for consumption rather than "packaged" for consumer use. Although OSHA believes that most such products in terms of food items would not be hazardous under the rule in any event, it appears that some manufacturers are nevertheless providing material safety data sheets for such items as aflatoxin in peanut butter used in a restaurant. To ensure such interpretations are not made, and that material safety data sheets are not unnecessarily being provided for such items, OSHA is proposing this modification to the exemption and inviting comment on the proposed language.

*Consumer products.* One of the principles upon which the HCS is built is that employees are entitled to information regarding any chemical which is hazardous and to which they are potentially exposed. The type of use this product is intended for is irrelevant—the risk being addressed is exposure to a chemical without knowing what the hazards and appropriate protective measures are. That being the case, the 1982 NPRM contained no exemptions for any "types" of chemicals. The exemptions which were in the original final rule were based upon comments submitted to the rulemaking record after that proposal. OSHA limited the exemptions to situations where other regulatory programs adequately addressed the problems involved (e.g., labeling exemptions for those products labeled in accordance with another Federal agency's requirements), or where the hazards did not result from workplace exposure.

In the area of consumer products, the original final rule included an exemption for additional labels on such products when they are labeled in accordance with the requirements of the Consumer Product Safety Commission

(CPSC). CPSC's requirements for labeling of hazardous substances are for the purpose of protecting consumers when such products are used in the home, the school, and recreational facilities (15 U.S.C. 2052(a)(1)). The Federal Hazardous Substances Act, 15 U.S.C. 1261 *et seq.*, and regulations issued under that Act by CPSC are not designed to protect workers. See *American Petroleum Institute v. OSHA*, 581 F.2d 493, 510 (5th Cir. 1978), *aff'd on other grounds sub. nom. Industrial Union Dep't. v. American Petroleum Institute*, 448 U.S. 607 (1980).

Consumer products generally do not include the type of specific hazard information OSHA would require on the labels of containers of hazardous chemicals which are shipped. Although some consideration is given to chronic hazards, the basic emphasis is on acute effects. In addition, the labels focus on precautionary statements and routes of exposure rather than informing the user of the specific hazards. For example, a label for lead solder purchased in a hardware store indicates that it is "fatal if swallowed" and "causes severe burns," but gives no indication of the fact that lead causes not only acute lead poisoning but also has severe effects on a number of body systems, including damage to blood-forming, nervous, and reproductive systems (see, OSHA's lead standard, 29 CFR 1910.1025). Furthermore, the primary route of entry for occupational exposure to lead would normally be inhalation—the consumer label does not indicate that inhalation of fumes generated when soldering are of concern. (Ex. 4-71). Conversely, a properly prepared MSDS for the same material will indicate the full range of health effects, the appropriate protective measures, the fact that there is an OSHA standard for the material with a permissible exposure limit, and other useful information for both the employer and the employee being exposed.

OSHA nevertheless decided to permit the CPSC labels to suffice so as not to disrupt the extensive labeling conducted in accordance with those rules. OSHA believed that this could be justified on the basis that some information is provided on the labels that would be useful to workers, and that the requirement for MSDSs would provide what information is necessary to supplement the labels. 48 FR 53289. This additional information is critical to ensuring that training can be properly conducted, and that adequate protective measures are used in the workplace.

OSHA is not preempted from modifying the labeling requirements for those products covered by CPSC that may also be found in the workplace. 15 U.S.C. 2080. Where products are used in both industry and the home "there may be dual, or overlapping jurisdiction between the Secretary of Labor under OSHA and the Commission under the Consumer Product Safety Act." W. Kimble, *Federal Consumer Product Safety Act*, 337 (1975). "Different standards may \* \* \* be applied to eliminate or reduce a hazard to the consumer than are applied to eliminate or reduce the same hazard as it confronts the \* \* \* workman \* \* \* *Id.* As the Fifth Circuit of the U.S. Court of Appeals found when considering labeling requirements for benzene, "[A]lthough an existing requirement for labeling under another act may affect the reasonable necessity for an OSHA requirement" section 4(b)(1) of the OSHA Act does not prohibit OSHA from requiring containers of hazardous chemicals to bear the warning labels authorized by section 6(b)(7) when the CPSC requires labels on the same products. *API v. OSHA*, 581 F.2d at 510. Therefore, OSHA is free to impose requirements determined to be necessary to protect employees from the hazards of products that may also be considered

consumer products regulated under the requirements of the CPSC.

Upon considering what information is necessary for the protection of workers exposed to those so-called consumer products in the workplace, OSHA decided that protection of workers would be served by allowing the CPSC labels to suffice, but requiring MSDSs and training as for any other hazardous chemicals. There appears to be some misconception that by virtue of being permitted to be marketed to consumers, consumer products are inherently safe and don't require any additional information be given to workers using them. This certainly is not the case.

The Consumer Product Safety Commission (CPSC), in its National Electronic Injury Surveillance System (NEISS), compiles estimates of product-associated injuries based on a statistically significant sample of incidents reported to institutions with emergency treatment department. Information regarding work-related injuries treated in emergency rooms has subsequently been provided by CPSC to the National Institute for Occupational Safety and Health (NIOSH). See Ex. 4-77.

These work-related data are total numbers of chemical injuries, and are not collected in such a way that the consumer product injuries in the workplace can be separated from other chemical product injuries. The CPSC version of the data is reported by type of product, while the NIOSH work-related data is grouped by source of injury. Nevertheless, much information regarding reported injuries can be derived from the data as presented, and give some indication of the numbers of serious injuries related to the use of chemicals. Since these data only deal with injuries which require emergency room treatment, it can be assumed that they are a small subset of the total number of injuries which occur.

According to the CPSC, the national estimate for emergency room treatments of injuries related to paints, varnishes, and shellacs is 10,712 and 75% of these injuries occur in adults from ages 15 through 64, an age range which would encompass adults who work. At least 5% of these injuries result in hospitalization. National estimates for other types of chemical products which would also be found in the workplace include: 7530 injuries related to adhesives (51% of them in the adult working age categories); 3186 injuries related to lubricants (71% in the adult working age categories); 2977 related to drain cleaners (63% working age adults); 1882 related to automotive chemicals (69% working age adults); and 5584 related to laundry soaps or detergents (52% working age adults). There are many other products for which injuries are reported and which would be expected to be found in the workplace. These numbers indicate that adults of working age are being injured through the use of consumer products, whether in the home or in the workplace. In workplaces where these products are being used more frequently or for longer periods of time, the risk of injury increases. Appropriate communication of hazards and protective measures decreases that risk of injury.

The NIOSH data indicate that a total of 136,212 work-related chemical injuries were estimated to have been treated in emergency rooms in 1986. The sources of injuries included in this total were chemicals and chemical compounds (solids, liquids, gases): 102,428; coal and petroleum products; 23,532; and soaps, detergents, cleaning compounds not classified elsewhere: 10,252. There were other categories of sources of injuries that had chemical product exposures in them, but these three were expected to be the ones of cost significance. As mentioned above, it is not possible to determine which of these work-related injuries result solely from consumer products.

However, in categories such as soaps, detergents, and cleaning compounds, it can reasonably be assumed that a number of them were consumer products.

Many products used industrially are also sold and used as consumer products. Thus, exempting such products is in essence exempting them because of the method of distribution for them, *i.e.*, that they are generally sold in retail establishments, rather than through wholesale distribution systems. This is not an appropriate rationale for such an exemption since it does not consider either exposure or hazardous nature. Of particular concern is that the CPSC label is designed to protect consumers under normal conditions of consumer use, or reasonably foreseen misuse, and is frequently directed towards protection of children unintentionally exposed in the home, rather than being directed towards protection of workers exposed repeatedly, and to potentially larger concentrations of the material. In fact, a number of consumer product labels recognize this difference in exposure and note on the label either that the product is not intended to be used in the workplace (Ex. 4-64), or that a material safety data sheet should be acquired if it is used in the workplace (Ex. 4-71).

It is also important to note that the record overwhelmingly supports the need for a comprehensive hazard communication program, comprised of labels, material safety data sheets, and training. In 1981, OSHA published and later withdrew a NPRM which was a labeling standard — it had no provisions for development of material safety data sheets or for training. One of the primary reasons for the withdrawal was the lack of support for a rule which relied only on label information. In fact, only one commenter on the 1982 NPRM believed that the MSDS should not be the primary source of information on the chemical (H-022 Ex. 19-49), whereas numerous respondents endorsed the MSDS provisions and role in hazard communication as

being important and necessary (see, e.g., H-022 Exs. 19-11, 19-62, 19-75, 19-91, 19-119, 19-156, 19-177, and 19-207). For example, the Chemical Manufacturers Association (Ex. 19-91) stated that: "[T]he proposed standard appropriately makes the MSDS, rather than the actual container in the workplace, the source from which employees and their representatives may obtain detailed information regarding potentially hazardous substances used in the workplace." Similarly, the American Petroleum Institute (Ex. 19-111) stated that "labels may not always be the most effective means for communicating the potential hazards of a work area \* \* \*" and that "MSDSs constitute a vital means of communicating safety and health hazards presented by particular chemicals and mixtures to *employer/users* \* \* \*." And American Cyanamid Company also agreed that "the use of the MSDS as the primary source of data for properties of commercial chemicals is a worthy part of the proposed regulation \* \* \*." (Ex. 19-119.)

OSHA thus did not exempt consumer products from any provisions of the original final rule other than labeling. This was an explicit recognition by the Agency of the greater potential for exposure in the workplace, and the lack of complete information on consumer product labels to address such situations (48 FR 53289):

OSHA recognizes, however, that there may be situations where worker exposure is significantly greater than that of consumers, and that under these circumstances substances which are safe for contemplated consumer use may pose unique hazards in the workplace. For this reason, the standard's exclusion is limited to labeling. It does not exempt employers from the material safety data sheet and training requirements of the standard with respect to any of these substances, provided of course that the substance otherwise meets the standard's definition of hazardous chemical. Moreover, it should be stressed

that these labeling exclusions are for the enumerated substances only. To the extent that any employer uses other chemicals, such as in the manufacture or processing of these substances, they are fully subject to the requirements of this standard.

During the implementation of the original final rule, OSHA determined that its enforcement policy regarding consumer products would focus on the type and extent of usage (see, OSHA's instructions to compliance officers for enforcement of the HCS, Ex. 4-24):

A common sense approach must be employed whenever a product is used in a manner similar to which it could be used by a consumer, thus resulting in levels of exposure comparable to consumer exposure. The frequency and duration of use should be considered. For example, it may not be necessary to have a data sheet for a can of cleanser used to clean the sink in an employee restroom. However, if such cleanser is used in large quantities to clean process equipment, it should be addressed in the Hazard Communication Program.

This appeared to OSHA to be a reasonable accommodation for employers who really do use consumer products in the manner intended, and with the same frequency and duration of exposure as would be experienced as consumers. OSHA has had no problems in implementing this enforcement policy, and it has been our experience that covered employers understand it and are able to comply. Therefore, although it is a policy which decreases the amount of information available to some employees covered under the rule, OSHA felt it could be justified based on the fact that under the same circumstances in the home the same type of information would be available to that individual for protection. Many employers have told OSHA that consumer products are included in their hazard communication programs regardless of the en-

enforcement policy of the Agency because they believe that all hazardous chemicals should be included in an appropriate hazardous materials management program.

OSHA recognized that many more non-manufacturers would use consumer products than would be found in manufacturing facilities, and that the method of obtaining them might more likely be from retail distributors than wholesale. Thus the ANPR included questions regarding the use of such products, and the means of obtaining them. Relatively few responses were received. However, the responses did confirm that in many cases the use of consumer products results in significant exposures that warrant more information being available than that which appears on a consumer product label. For example, Daniel Construction Company responded to the questions as follows (Ex. 2-59):

The most common "consumer products" used in the construction industry are wood and wood products, caulking, and aerosol cans of spray paints, cleaners, lubricants, and solvents. These products are not typically used differently than consumers do. That does not mean that employees cannot be overexposed to the ingredients. For example, a 16-ounce spray can of paint used in a 10' x 10' x 10' room can produce a concentration of solvent that is more than ten times the acceptable exposure limit.

Of course a consumer product label would not normally indicate that there is a permissible exposure limit for a solvent present in the paint since this information is unrelated to consumer use and exposure. However, a MSDS for the product would be required to include such information which will enable the employer to ensure that employees are properly protected in a situation as that described by Daniel Construction Company. In fact, the CPSC has recommended the use of MSDSs for products they cover in school laboratories (Ex. 4-56), recognizing

that additional information is desirable in these types of exposure situations. "Material safety data sheets should be obtained on each chemical delineating particular hazards or handling procedures." "Have a material safety data sheet on hand before using a chemical."

Similarly, the American Gas Association (Ex. 2-83) indicated that use of consumer products could result in different exposure levels than those encountered during consumer use:

It could occur—not because of different use, but because the use by employees is for prolonged periods of time. An average consumer may use a cleanser several times a week to clean the kitchen or bathroom floor, whereas a gas company employee may use the same cleanser every day to clean a gas facility.

The Massachusetts Institute of Technology (MIT) (Ex. 2-120) also indicated that their employees are exposed to consumer products in greater amounts than consumers would be, including paint and thinners used by the painters, printing fluids used by the graphic arts services, cleaning and polishing chemicals used by the custodians, lawn and garden chemicals used by the grounds maintenance crew, and lubricating sprays and other maintenance products used by mechanics/electricians. MIT obtains MSDSs from vendors to ensure employees are properly protected from these materials. Mountain Bell (Ex. 2-164) also confirms that consumer product exposures may be greater in its industry, particularly " \* \* \* where products are used on an extensive basis such as in automotive operations, janitorial operations, and copying operations \* \* \*."

A few respondents felt that the consumer product label should be enough information (Exs. 2-75, 2-79, 2-99, 2-107, and 2-116). Others, however, noted that employees are not getting enough information regarding these prod-

ucts and that MSDSs should be made available. For example, Economics Laboratory, Inc., a manufacturer of consumer products for cleaning and sanitizing, suggested (Ex. 2-67):

In the use of cleaning and sanitizing products, a principal point of worker exposure is during the transfer of concentrate from the original container to prepare a use solution. We supply products labeled as per ANSI and/or FHSA, but we have seen instances of deficient labeling on the products of some other manufacturers. We now send to all customers in these sectors an MSDS for every product they purchase. Many of our customers now use the labels, MSDS and other aids to train employees, but a formal requirement would increase that number throughout the industry.

The Adhesive and Sealant Council, a trade association which represents manufacturers of materials that may be marked as consumer products, also addressed this issue (Ex. 2-109):

\* \* \* The Council is concerned that in certain cases hazard information may not reach employees of manufacturers and nonmanufacturers. ASC members are aware of cases in which consumer products are purchased from retailers or distributors in consumer quantities but are used in the workplace. Under such circumstances the original manufacturer is not made aware of the use of its consumer products in the workplace. Thus, some workers may lack needed hazard information unless they or their employer affirmatively and voluntarily make an effort to obtain and promulgate the information.

There are, of course, safety requirements applicable to consumer products under the Consumer Product Safety Act, and other federal laws, but these do not contain broad workplace safety requirements

beyond standards and labeling, such as material safety data sheets. The present OSHA docket has not been opened as to this issue. However, ASC believes the problem could be greater with regard to non-manufacturer distribution than with direct manufacturer distribution \* \* \*

One further comment submitted by an employee representative summed up the situation by stating that when a product is used by a professional in the workplace, it is no longer a "consumer" product regardless of the fact that a consumer can purchase the same product (Ex. 2-199).

OSHA decided to incorporate into the revised final rule its existing enforcement policy which is tied to type and extent of exposure (52 FR 31878; paragraph (b)(6)(vii)):

Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers \* \* \*.

OSHA further stated that this exemption "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products which employees are exposed to at home as well as at work, and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." 52 FR 31863. OSHA had also examined the existing State rules in the area of right-to-know, and found that many had consumer product exemptions that were related to the type and extent of usage. (See, e.g., Illinois, 48 Ill. Rev. Stat. §1401 (consumer goods exempted "provided that employee exposure to such consumer goods is not significantly greater than consumer

exposure occurring during the principal consumer uses of the consumer goods"); Maine, 26 M.R.S.A. s1709-1725 as amended (exempts consumer products and foodstuffs "to which, in the employer's knowledge, employee exposure is not significantly different from that of the general public during foreseeable use of the substance"); Massachusetts, Chapter 111F of Massachusetts General Laws (exempts consumer goods which are not carcinogens, mutagens, teratogens, neurotoxins, or "extraordinarily hazardous" substances and which are "used in the workplace in such a manner that employee exposure is equivalent to exposures resulting from consumer usage"). Other State rules are consistent with the original HCS and have no exemptions for consumer products (*see, e.g.,* Arizona, Kentucky, South Carolina).

There were some comments submitted on the coverage of consumer products following the publication of the revised final rule. A number of them felt that they could not define what exposures in the workplace would be comparable to consumer exposure, and that the rule should exempt such exposures unless they are "significantly" greater than consumer exposure or that such products should be completely exempted (Exs. 5-53, 5-72, 5-88, 5-93, 5-94, and 5-97). As we have stated earlier, a common sense approach is required in making these determinations, and most employers we have dealt with clearly know whether the use of such products is unusual or frequent. However, we are inviting further comment on the issue of adding the word "significantly" to the consumer product exemption to modify "greater."

Another suggestion submitted (Exs. 5-84, 5-93) was to use the same consumer product exemption used by Congress in the community right-to-know provisions of the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. 99-499 (Ex. 4-16), which is being implemented by the Environmental Protection Agency (EPA). The exemption would then be for "any substance to the

extent that it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." As this exemption is also not related to the extent of employee exposure—which is the concern of OSHA in the HCS—it is not appropriate for this rule.

The legislative history for SARA does not discuss the household or consumer product exemption. OSHA's rule preceded the SARA legislation, and it can be argued that the exemptions in SARA were intended by Congress to address the different needs of community right-to-know versus worker right-to-know. Community right-to-know under SARA entails informing the general public and emergency response facilities about chemicals in their neighborhoods that could cause hazardous conditions during emergency situations. The HCS involves informing employees about the chemicals they are potentially exposed to on a day-to-day basis as a result of their work. Exemption of consumer products under SARA was not a determination by Congress that such coverage is unnecessary in the workplace.

The National Paint and Coatings Association (NPCA) suggested that it is too costly to provide MSDSs to paint contractors and retail establishments and that they therefore should not be required for consumer product paints (Ex. 2-75). Alternatively, NPCA suggested containers of one gallon or less should be exempted. As has already been described, OSHA believes that the only appropriate criteria for determining whether a chemical is covered is the existence of a hazard and the potential for exposure. Both of these criteria are met for many paint products. As was described above, use of even a 16 ounce spray can of paint can result in employee exposures of ten times the permissible exposure limit, so the size of the container is not the determining factor.

The NPCA indicated that it would be difficult to comply due to the large numbers of products involved and the multiplicity of distributors. However, there are already a number of States which require MSDSs for such products, and it is our understanding that many employers in construction have been able to obtain MSDSs for consumer product paints from their vendors. Furthermore, there is evidence in the record that paint producers customarily distribute documents referred to as "technical data sheets" which prescribe methods of application and other use-related information, including, in some situations, brief indications of hazards (Ex. 4-60). These technical data sheets are apparently supplied to distributors to provide information regarding the products that does not appear on the product labels. It appears to OSHA that if these sheets can efficiently be distributed for paint products, then MSDSs can as well. Alternatively, the information required on a MSDS could merely be added to the technical data sheets. It certainly cannot be argued that labels alone provide the same type of information that a MSDS would.

An issue that is related to the coverage of consumer products, and is undoubtedly the genesis of some of the recommendations to eliminate such products from coverage, is the distribution of consumer products in commerce. It is important to point out that the vast majority of consumer products are not covered by this rule. Only those which are hazardous are potentially covered, and within that group, only those which are used in the workplace. Producers of the materials which, while marketed to consumers, are likely to be sold to employers and used in the workplace are well aware of that potential market. (See, e.g., Ex. 2-148.) Thus manufacturers of materials used in construction, graphic arts, and cleaning operations, are aware that their products have industrial applications even when sold as consumer products. MSDSs

have already been prepared and distributed for many, if not most, of these products. Manufacturers are required to have MSDSs for their own workers, and have already been required to distribute such MSDSs to non-manufacturing customers in a significant number of states with right-to-know rules. Furthermore, most manufacturers have and make available MSDSs because of product liability concerns separate and apart from any regulatory requirements. This was certainly demonstrated in the record by the large number of manufacturers that produced MSDSs in the absence of such requirements prior to promulgation of the original HCS. The sealed container provision also eliminates many consumer products from coverage in workplaces which may handle such materials, but do not open the containers to use them.

The record for the original final rule strongly supported the need for automatic transmittal of MSDSs from producers to users through the supply chain. The cost analyses of the rule demonstrated that a system that relies on users requesting a copy of a MSDS will be more costly, and less protective (48 FR 53327). However, in the revised final rule, OSHA determined that where retail distributors are involved in the distribution chain it was necessary to slightly revise this position. Therefore, the revised final rule stated (52 FR 31882, paragraph (g)(7)):

Retail distributors which sell hazardous chemicals to commercial customers shall provide a material safety data sheet upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available. Chemical manufacturers, importers, and distributors need not provide material safety data sheets to retail distributors which have informed them that the retail distributor does not sell the product to commercial customers or open the sealed container to use it in their own workplaces.

OSHA provided the following rationale for this departure from the automatic provision approach found to be necessary in the original final rule (52 FR 31866):

Retail distributors, however, often sell to businesses and the general public and frequently have no way of knowing who a particular purchaser is. Under the current rule, retail distributors might have to give material safety data sheets to each customer to ensure that commercial customers get the information they need under the HCS. A specific statement regarding retail distributors is, therefore, included in paragraph (g)(7) to address this practical problem. Those retail distributors who sell hazardous chemicals to employers must provide a material safety data sheet upon request, and must post a sign or otherwise inform the employers that an MSDS is available.

OSHA recognizes that although it is possible for an employer to incidentally purchase a hazardous chemical from any type of retail establishment, it is not reasonable to expect every retail store that happens to carry such materials to keep a file of MSDSs in case an employer decides to make a random purchase at the store. We further recognize that such random purchases would normally be of small amounts that would generally be used as a consumer uses them; and thus would be exempt under the rule anyway. However, even in those cases where they are used in greater quantities, it appears more reasonable to place the burden on the user in that situation to obtain the MSDS than to have every retail establishment keep large numbers of them on file. This provision also limits the number of establishments to which distributors of such products have to transmit MSDSs.

The National Retail Merchants Association (NRMA) (Ex. 5-74) indicated that the final rule " \* \* \* has struck a good balance between the obvious problem of requiring retailers to train all employees about every product which

may appear on retailers' shelves, and the real need for employee training for emergency spillage of packaged products." They did think, however, that the definition of "consumer product" as stated by CPSC might be confusing to retailers, particularly small businesses, since "retailers would have to go through the process of examining all goods sold in their stores to determine if they are or are not consumer products." In fact, if retailers are selling the products they are considered to be "consumer" products — there is no determination to be made by the retailer in this respect, it's a determination made by the producer in developing the appropriate label for the material based upon its intended use.

With regard to the issue of making MSDSs available at the retail distribution level, NRMA suggested that OSHA define the term "commercial account" to ensure it is being properly interpreted and applied. They further suggested that this definition be related to selling items in large quantities and below the regular retail price. "Such accounts can be identified, and it would be less burdensome to notify such customers that MSDSs are available upon request. In fact, many retail firms have already done this under many state right-to-know laws." (Ex. 5-74).

The United Brotherhood of Carpenters and Joiners of America (UBCJA) similarly noted that with regard to MSDSs being available from retail distributors (Ex. 2-105):

\* \* \* [T]hose contractors who do purchase materials from retail outlets generally buy them from a building-supply house that sells such materials in larger quantities, and may give them a volume discount. These stores would have no problem supplying MSDSs to customers \* \* \*

OSHA agrees with the NRMA that adding such a definition will clarify that many retail distributors have no need to maintain MSDSs because they do not generally supply

hazardous chemicals to commercial customers (e.g., grocery stores, clothing stores). Therefore, we are proposing a definition for the term "commercial account" based upon NRMA's recommended criteria, and are inviting comment on the appropriateness of this approach. In addition, we are proposing to further modify the language in paragraph (g)(7) to indicate that when an employer purchases a consumer product from a retail establishment which does not have commercial accounts, and that employer needs to obtain a material safety data sheet, the retail distributor's duty is limited to providing, upon request, the name, address, and telephone number of the chemical manufacturer, importer, or distributor from which a MSDS can be obtained. We believe these modifications should clarify the duties of distributors of consumer products through retail distribution.

In summary, OSHA is not proposing to modify the consumer product exemption *per se*, although it is inviting comment on certain issues. The Agency continues to maintain that the mode of distribution of a product (i.e., through retail distribution rather than wholesale) is not a criterion that is related to employee exposure or the need for information and therefore is not relevant to whether consumer products should be covered by this rule. The modifications proposed to the provisions regarding retail distribution should clarify them to ensure the regulated community is aware what needs to be done to comply with the revised final rule. OSHA invites comments on these issues as well.

**OMB Determination.** OMB has disapproved the information collection requirements for any consumer products that are exempted from the EPA requirements for community right-to-know (Ex. 4-67). OMB maintains that such an exemption would make the OSHA and EPA right-to-know requirements, which are closely linked, mutually

consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for the "consumer products" into two groups: An OSHA "consumer product" and an EPA "consumer product." Furthermore, OMB believes this exemption "establishes objective criteria that enable upstream and downstream employers to determine what is exempted and what is included. Upstream suppliers would not be forced to speculate as to the identity of the final user (consumer or employer?) in determining whether the product is subject to the HCS. The flow of MSDSs and labels would be restricted to unpackaged substances or substances packaged for industrial or commercial use, for which detailed hazard information would be expected to have practical utility." OSHA invites comments on these conclusions as well.

**Drugs.** The original HCS covered the manufacture and formulation of drugs in the manufacturing sector. The rule included a labeling exemption for such products when they were labeled in accordance with the regulations of the Food and Drug Administration (FDA), but all other aspects of the program were applicable to the drug products as well as those chemicals used to make them. In preparing the revised final rule, OSHA determined that it is not necessary to cover such drugs in the non-manufacturing sector when they are in a form that is not likely to result in exposure to employees. Thus the rule totally exempted drugs when they are in a retail establishment (i.e., a drug store or a pharmacy) and packaged for sale to a consumer (paragraph (b)(60(v))). Therefore all over-the-counter drugs were exempted from the point of packaging, and many prescription drugs were exempted as well since they are packaged prior to reaching the retail establishment. In addition, OSHA included an exemption for drugs in solid, final form for administration to a patient. As mentioned previously, this was based on the Agency's

determination that the potential for exposure is minimal for these drugs.

However, in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies (e.g., nurses, nurses' aides, pharmacy aides, or technicians), OSHA did not exempt those drugs that are not solid or are not pre-packaged for sale to consumers (a pharmacy in a hospital would be considered to be a retail sale establishment for purposes of the exemption as written). Thus nurses required to mix anti-neoplastic drugs, for example, would be entitled to a material safety data sheet and training under the revised final rule. There was little discussion of the drug issue in the record prior to the revised final rule (see, e.g., Ex. 2-176). However, since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected. As an example of potential problems, a recent report in the American Industrial Hygiene Association (Ex. 4-59) described one hospital's experience with a drug that is generated as an aerosol in a tent for administration to children. Nurses, respiratory therapists, doctors, and other employees are directly exposed when they enter the tent to care for the patients. Information on the drug indicates that such occupational exposure may result in carcinogenesis, fertility impairment, and fetotoxicity. In addition, however, employees who were exposed also complained of experiencing acute effects such as headaches, burning and dryness of the eyes, coughing and dryness of the upper respiratory tract. The hospital eventually devised a protective program for exposed employees based upon its experiences. A MSDS with recommendations for protective measures may have helped them resolve the situation prior to employees being exposed.

In response to the approach taken in the revised final rule, the National Wholesale Druggists' Association

(NWDA) (Ex. 5-85) recommended that OSHA recognize package inserts approved under FDA regulations as an acceptable alternative to material safety data sheets required under the rule. Additionally, the NWDA suggested that the *Physicians' Desk Reference*, a privately developed reference regarding drugs, also be considered to be an alternative to requiring MSDSs for drugs approved by FDA. Other commenters recommended that all prescription drugs be exempted since they are adequately covered by FDA labels, other available resources, and the medical training of persons handling or supervising handling of the drugs (Exs. 5-77 and 5-102).

Although the purpose of the Federal Food, Drug, and Cosmetic Act administered by the FDA is to protect consumers of such products and the general public (see, e.g., *Pharmaceutical Mfrs v. FDA*, 484 F. Supp. 1179, 1183 (D.Del 1980)), the product data inserts that accompany pharmaceuticals do contain some information that is analogous to that found on MSDSs and would provide some protection for employees. In particular, at 21 CFR 201.100(d)(1) (as paraphrased below), FDA requires that inserts for prescription drugs for human use must contain the following information: Adequate information for such use, including indications, effects, dosages, routes, methods, and frequency and duration of administration and any *relevant warnings, hazards, contraindications, side effects, and precautions, under which practitioners, side effects, and precautions, under which practitioners* licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended \* \* \* [in] the same [ ] language and emphasis as labeling approved or permitted \* \* \*. (Italics added). This would be useful chemical hazard information for employees involved in administering the products even though em-

employee protection is not the primary purpose of the information presented.

In addition to publication of such information in the package inserts themselves, the FDA regulations also state that (21 CFR 202.1(1)(2), as paraphrased below): [R]eferences published (*for example, the "Physicians' Desk Reference"*) for use by medical practitioners, pharmacists, or nurses, containing drug information supplied by the manufacturer, packer, or distributor of the drug and which are disseminated by or on behalf of its manufacturer, packer, or distributor *are hereby determined to be labeling as defined [by] the Act.*" (Italics added.) According to the *Physician's Desk Reference* (PDR) in its *Forward* (40th ed. 1986), "drug information" in the PDR is "prepared by manufacturers, edited and approved by their medical department and/or medical consultant." PDR publishes the information verbatim. *Id.*

OSHA is proposing to modify the definition of "material safety data sheet" under the rule to indicate that a package insert approved by FDA, or an entry in the PDR prepared in accordance with FDA's requirements, be considered in compliance with the HCS requirements for a MSDS for these products. In addition, the exemption regarding solid drugs is being corrected to read "e.g., tablets or pills" rather than "i.e." as is currently indicated in the revised final rule (*see, e.g., Exs. 5-77, 5-85, and 5-102*).

The Agency is inviting comment on this issue, particularly from employees who would be affected by this modification to ensure that they agree that this information is adequate for their protection. The existing exemption for labeling would remain in effect, employers would still have to have hazard communication programs where covered, and training would have to be given to those employees who have not previously been trained regarding the hazards and protective measures.

Although hospitals and health care institutions have not participated in the rulemaking to date, it appears to OSHA that another issue of concern in these institutions would be labeling of drugs dispensed by a pharmacist to a nurse who gives it to the patient. It is our understanding that these dispensed drugs may not be marked in any way, and since the nurse doesn't transfer the material from the labeled container, the portable container exemption for labeling would not apply. OSHA invites comment on suggestions for dealing with this issue for non-solid drugs.

*OMB Determination.* OMB has disapproved "coverage of any FDA-regulated drug" in the non-manufacturing sector because such coverage "would result in duplicative paperwork and is unlikely to provide additional information of any practical utility." (Ex. 4-67) Comment is also invited on this alternative of totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces.

\* \* \* \* \*

*Multi-employer worksite provision.* When OSHA promulgated the original final HCS, there was a requirement in the written hazard communication program that employers include in the plan and implement "the methods the employer will use to inform any contractor employers with employees working in the employer's workplace of the hazardous chemicals their employees may be exposed to while performing their work, and any suggestions for appropriate protective measures." 48 FR 53343, paragraph (e)(1)(iii).

This provision was included in the rule to ensure that contractor employers had enough information to protect their employees when performing work on manufacturing sites. Contractors are often used in this context to perform such tasks as servicing and cleaning out reactor vessels,

and their employees may be exposed to significant quantities of hazardous chemicals under those circumstances.

The rule did not address the opposite situation, *i.e.*, where a contractor brings a hazardous chemical to the manufacturing facility and exposes the manufacturing employer's employees. OSHA received many inquiries from manufacturers concerning this issue. It is apparently a pervasive problem, and these manufacturers wanted to be able to use some provision in the rule to compel contractors to provide such information. After a number of informal discussions with interested parties concerning how manufacturers might resolve this problem, OSHA included a recommendation in its compliance directive (Ex. 4-24) that employers consider including arrangements for an exchange of hazard information in their contracts. We had been told that this practice was being used successfully by a number of manufacturers.

OSHA believes that this problem of multiple employers using hazardous chemicals on the same site becomes even more pressing when the standard covers the non-manufacturing sector, particularly in the construction industry. In fact, representatives of the construction industry have long supported requirements to ensure information is available to them on such sites. As noted in the preamble to the expanded rule (*see* 52 FR 31858-59), the Advisory Committee on Construction Safety and Health (ACCSH) made recommendations for signs, labels, MSDSs, and training on construction sites as early as 1980 (Ex. 4-4. *Report on Occupational Health Standards for the Construction Industry* (5/16/80)). At that time the Committee felt "that the construction employer was not in a position to easily acquire information on the hazards associated with the many products and materials used in the industry, but that such information was fundamental to the preparation of warning signs, labels, training pro-

grams, and other important job safety and health activities." 52 FR 31859. The HCS did not exist at the time of the report, and the Committee thus recommended that a solution to the problem of lack and information would be to modify and extend the existing OSHA standard for material safety data sheets which at the time applied only to ship repairing, shipbuilding, and ship breaking (29 CFR 1915, 1917, and 1918):

The modified standard would require manufacturers or formulators of harmful materials or agents to supply material safety data sheets along with their products in such a fashion that they reach construction employers \* \* \* Under the standard, these data sheets would then be available at the construction work site for use by employers and employees.

Furthermore, ACCSH indicated in the same report that worker training should include the "exact identification of the material or process that is hazardous," "health effects of the material," and "location and availability of chemical identification lists and substance data sheets." ACCSH clearly believed that substance-specific information is necessary and appropriate on construction sites.

This issue was also addressed in a number of comments submitted in response to the ANPR. For example, the National Association of Home Builders (NAHB) (Ex. 2-223) addressed the issue of multiple subcontractors:

It is crucial that OSHA recognize that any of these subcontractors may bring "hazardous" materials onto the jobsite, but exposure to these materials will not necessarily be limited to employees of the subcontractor. Thus, an electrician may be exposed to paint fumes and a plumber may be exposed to muriatic acid. Obviously, some system of conveying informa-

tion to workers must be developed which accounts for this diverse workforce on the site.

Similarly, the National Erectors Association (Ex. 2-226) suggested:

The customer and the general or prime contractor(s) should jointly develop and agree on a hazard communication program for that site. The general or prime contractor should in turn discuss and develop an appropriate hazard communication program with each of the subcontractors which he has control over. MSDS information should be discussed and updated at the weekly tool box safety meetings and the contractor progress meetings.

The National Constructors Association (NCA) (Ex. 2-108) also indicated that:

Another major problem exists in that owner/clients do not automatically furnish their MSDS's to contractors working on the owner/client property, that are or could be, exposed to owner/client controlled hazardous substances.

In a later comment, NCA recommended that language be included in the expanded scope rule as follows (Ex. 2-225):

Contractor employers using hazardous chemicals which may create a hazard to employees of other employers at a multi-employer workplace during normal conditions of use, or during a foreseeable emergency shall:

\* \* \* Inform the other employers of the storage and work locations of the hazardous chemicals.

\* \* \* Supply a copy of the material safety data sheet to each employer who requests a copy;

\* \* \* Review the material safety data sheet with other employers whose work will be directly affected by the use of the hazardous chemicals.

In addition, NCA included a provision in their recommended standard that addressed employee access to MSDSs at the worksite: "The contractor employer shall maintain copies of the material safety data sheets for each hazardous chemical used by the contractor employer, or furnished by another employer in the workplace, and shall make them readily accessible during each work shift to employees when they are in their work area(s)."

The American Road & Transportation Builders Association (Ex. 2-81) also addressed the issue: "Coordination of responsibility for MSDS access, labeling, and training, again, is necessary \* \* \*. A possible compromise would be to make the information available where notices are generally posted, at a central location, where workers often report for work."

The United Brotherhood of Carpenters and Joiners of America (Ex. 2-105) reported that contractors are already making MSDSs available on construction sites:

Many contractors now keep a loose-leaf book of MSDSs in their trailer on site for each access. Some contractor associations have produced loose-leaf binders that review the chemicals commonly used at worksites, their hazards, and the HCS requirements. There are also numerous private services available to provide data sheets on microfiche and on-line by computers \* \* \*. Microfiche takes up little space (one loose-leaf binder) \* \* \*. Any contractor with a personal computer could tie into an MSDS data base by purchasing a modem.

The International Brotherhood of Painters and Allied Trades (IBAT) indicated that, as a general rule, MSDSs

have not been provided automatically to contractors. However, paint manufacturers have usually provided them when requested. Given the short duration of some construction jobs, however, receipt upon request from the manufacturer is too late — the job is completed. "Failure to have the MSDS available ahead of time does not allow a contractor ample opportunity to take into consideration the kind of equipment that may be necessary to do a job safely \* \* \*." (Ex. 2-199). The IBPAT confirms that MSDSs are necessary to properly protect painters, regardless of whether the paints are industrial coatings or consumer products: "If the paint manufacturer has any reason to believe that a product sold will be used by a professional, then the product should be provided with ways sufficient for the employer and the user to assure that the employer will receive the proper MSDS for the product \* \* \*. In general, products purchased by professional paint or allied product applicators are used at quicker rates for longer periods of time thus the same product will often pose greater risk to professionals than consumers. The types of products so purchased are also extremely varied, ranging from rather benign to extremely hazardous \* \* \*."

In preparing the revised final rule, OSHA took these comments into consideration and included a multi-employer worksite provision in the written hazard communication program requirements (52 FR 31880; paragraph (e)(2), as summarized below):

Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and im-

plemented under this paragraph (e) include the following:

\* \* \* The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;

\* \* \* The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

\* \* \* The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

As described in the preamble to the final rule (52 FR 31865), this type of provision is necessary to ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical. It also ensures that employers have the necessary information to adequately conduct training, and to select appropriate protective measures for the work operation. Several OSHA-approved State Plan States have incorporated similar provisions in their expanded scope rules, and have successfully implemented them.

ACCSH reviewed the multi-employer worksite provision at its meeting on June 23, 1987, and did not raise objections to the items addressed, including the provision for MSDSs to be made available on multi-employer worksites (Ex. 4-6). ACCSH recommended that provisions regarding material safety data sheets be amended to preclude use of a chemical on-site prior to receipt of an MSDS (Ex. 4-6,

Tr. 218, 222), and that employees who travel between workplaces must have a copy of an MSDS in their vehicles for each chemical they will be using (Tr. 243).

One member cited an incident which occurred on a construction site involving a potentially carcinogenic material. The label indicated the potential carcinogenic effects, but did not provide suggested protective measures. This is consistent with the HCS since protective measures are only required to be included on the MSDS. The job was stopped for three days until the company could obtain the MSDS and ascertain from it the protective measures they needed to implement to protect the workers. "This unfortunately is what is happening with a lot of labels that are being used today. The labels are not specific enough, and as a result, the control measures that are necessary to use that materials are not readily available until they get a material safety data sheet and read the details on it." Tr. 188.

Another member suggested that obtaining and maintaining MSDS information on a worksite is analogous to obtaining and maintaining instructions for assembling or installing equipment and similar tasks that are commonly performed in construction. The paperwork necessary to provide instructions is routinely provided prior to use as the job would have to be stopped if it was not received from suppliers at that time. "If the same urgency was placed on the MSDS in getting it to the job as it was [on] getting instructions on how to put \* \* \* together a piece of equipment on the job, it would arrive there." Tr. 190.

OSHA decided that the provisions as written adequately addressed the problems raised, *i.e.*, the standard already requires suppliers to provide the MSDSs, and employers to have MSDSs for each hazardous chemical in the workplace. However, OSHA believes that the ACCSH's discussion of the issues and the recommendations made regarding MSDSs clearly indicate that the Committee did not

envision hazard communication requirements for construction that do not include on-site availability for MSDSs.

The Committee also suggested that OSHA clarify the language of the rule to ensure that the written programs are maintained at each worksite, and OSHA adopted that recommendation in the revised final rule. Furthermore, on November 3, 1987, after reviewing the OMB letter regarding the information collection requirements of the rule, ACCSH unanimously reaffirmed its position that while a separate standard would be preferred for the construction industry, "the Committee does not feel it would be appropriate to exempt or remove protections existing now" under the HCS, and that the rule continued to apply in construction (Ex. 4-74).

As discussed above regarding consumer products, without MSDSs the hazard communication program will not be effective. The consensus of the participants in the rulemaking on the original final rule was that labels can only provide limited information—the detailed source of information must be the MSDS. Furthermore, adequate training cannot be conducted if the information is not available on the substances involved. As the National Paint and Coatings Association (H-022 Ex. 19-62) stated:

NPCA concurs with the Agency's assessment of the functions and utility of the MSDS as the primary component of a Hazard Communications Program \* \* \*. The label is limited in the amount and detail of hazard information which it can contain and still effectively communicate. The MSDS serves as the source document and amplification of the information presented on the label \* \* \* NPCA has had a long-standing policy of recommending that MSDS's

be provided to customer/employers even though not as yet required by law.

OSHA agrees with NPCA's assessment of the importance of MSDSs, although their more recent comments do not appear to be consistent with this approach since they have suggested that MSDSs are not necessary for paint contractors (Ex. 5-75). OSHA believes the need for such information is just as critical in the non-manufacturing sector where employees are exposed to the same hazardous chemicals as in the manufacturing sector. Many other manufacturers and their representatives concurred with OSHA's conclusion that a program cannot be effective without all of the major components included in the OSHA rule—including MSDSs being available to employees and employers at the job site (*see, e.g.*, H-022 Exs. 19-62, 19-91, 19-124, 19-156, 19-185, and 19-199.)

The comments received following publication of the final rule are mixed on this issue. One commenter (Ex. 5-108) posed a question that we believed was answered by the multi-employer worksite provision: "Although the law for training and maintaining MSDS will put the responsibility for their employees on the subcontractor, how about the exposure of two or more subcontractors' employees to each other, our exposure to products subcontractors' employees are using and their employees' exposure to products we are using? These are not everyday problems in manufacturing, therefore, here is another complex area that should be considered if the standard is to be explained." We agree, and hence addressed it in the written program requirements.

Several commenters believed that the provisions would not work because of the number of contractors on the site and the potential number of chemicals (Exs. 5-83, 5-84, and 5-89). One suggested alternative, however, was to

allow contractors to deposit copies of their MSDSs in a central location on site or make them available on some reasonable basis such as in their truck. This is already explicitly permitted under the rule. Similarly, the National Association of Home Builders (NAHB) testified during the OMB paperwork meeting (Ex. 5-76, Tr. 53) on the issue of keeping MSDSs on a multi-employer worksite. When questioned as to the feasibility of keeping them at a central location in the site, NAHB indicated that the preamble to the revised final rule appeared to allow such an option, but the standard did not. "Now if OSHA's honest opinion is that a central MSD depository on the site will take care of multi-employer worksites, let's see it in the rule \* \* \*." *See* paragraph (e)(2)(i) stating that the written program shall include methods the employer will use to either "provide the other employer(s) with a copy of the material safety data sheet or make it available at a central location in the workplace." 52 FR 31880. This is in the rule itself, and appears, therefore, to address NAHB's statement.

Some commenters have clearly misinterpreted the requirement of the rule for multi-employer worksites. For example, the Alliance of the Textile Care Associations (ACTA) (Ex. 6, Tr. 190-198) argued that they would have to maintain in their facilities MSDSs for all chemicals at their customers' sites. "An industrial laundry would be required to maintain material safety data sheets and other information from between 1,000 and 5,000 businesses. If one assumes only very conservatively 10 material safety data sheets per account, this would mean that an industrial launderer would be confronted with between 10,000 and 50,000 material safety data sheets organized by service route \* \* \*." The HCS does not require any such collection.

First of all, there is no requirement to maintain MSDSs for products at other sites so the launderer would not be required to maintain in its facilities any MSDSs from the facilities on its routes. MSDSs are only required for the chemicals used at the facility of concern. Secondly, service employees who are simply picking up and dropping off materials such as described in this testimony (10 minutes in the facility) are not generally "working" on that site in the sense of the multi-employer worksite provision, and are probably not "exposed" to the chemicals in the facility. The ACTA indicates that the HCS requires training on each and every chemical—this is not true. The HCS requires training on hazards, and this can be presented either by chemical or by categories of hazard (*e.g.*, flammability). In most situations, it is more practical and effective to train by hazard categories. Furthermore, the training teaches employees to use substance-specific information available to them on labels and material safety data sheets. The delivery people should receive such training, be advised to read labels, and trained to request material safety data sheets if they are "exposed" in the conduct of their duties at the customer's site and need more information. Availability of the MSDSs at the customer's site satisfies the requirements of the rule.

Although some of the commenters mentioned the large number of chemicals on-site as being a potential problem, others argued that construction sites have few hazardous chemicals, and therefore do not need right-to-know programs (*see, e.g.*, 5-17, 5-58, 5-81, 5-86, 5-108, and 5-117.) However, it was interesting to OSHA to note that the alternative recommended by these commenters to the rule as written was to require the following (Exs. 5-10, 5-65, and 5-117):

Post a list of hazardous chemicals at the job site with a copy of the MSDS.

Each contractor is responsible for posting only MSDS for substances they are using.

Make available to all employees a list of hazardous substances being used at site.

Require proper labeling for all hazardous substances prior to purchase.

Require contractors to provide personal protective equipment for their employees.

It appears that if these construction employees are recommending that MSDSs be maintained at the worksite, they must consider it to be feasible and appropriate. This worksite accessibility appears to be feasible at even the smallest sites (IBPAT, Ex. 2-199):

The painting contractor usually has an office, a trailer, a hotel room, a car, a shoe box—somewhere—from which business is conducted and where are found documents pertaining to the job, such as bid specs, purchase orders, employment rosters, coating technical data sheets and so on. All of these are materials which from time to time during the course of a job the employer will be required to make available or use at the job site. MSDS's would be treated similarly.

OSHA still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees. We are inviting further comment on this provision.

*OMB Determination.* OMB has stated that the "practical utility for the requirement to bring MSDSs on-site at multi-employer workplaces" has not been demonstrated. According to OMB, an acceptable option would be to "require employers at multi-employer worksites to keep labels intact on any containers they bring onto the work-

site; to train their employees in the hazards with which they work directly, in recognition of and response to the general hazards that are likely to be introduced by other employers, and in the need to observe hazard labels on the worksite and request MSDSs when further information is needed; and to provide MSDSs to other employers upon request." OMB has disapproved the "requirement to bring MSDS onto multi-employer worksites." OMB's suggested approach "relies on labels and general hazard training to protect workers from substances brought onsite by other employers." OSHA invites comment on this approach as well.

\* \* \* \* \*

#### IV. Clearance of Information Collection Requirements

The information collection requirements of the 1987 revised final standard were reviewed by the Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). OSHA subsequently published in the **Federal Register** the approval numbers for the rule (1218-0072), and OMB's letter regarding its disapproval of several items (December 4, 1987, 52 FR 46075; Ex. 4-67). As discussed above, OMB disapproved: (1) The requirement that material safety data sheets be provided on multi-employer worksites; (2) coverage of any consumer product that falls within the "consumer products" exemption included in section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986; and (3) coverage of any drugs regulated by the Food and Drug Administration in the non-manufacturing sector. In addition, OMB determined that OSHA should reopen the rulemaking on the HCS to consider alternatives to the definition of "article" which was

included in both the original and revised final rules. Lastly, OMB conditioned paperwork approval upon OSHA's consulting with the U.S. Small Business Administration and the Department of Commerce in order to develop a plan for a Federal administrative effort that will provide assistance to the regulated industries to alleviate the paperwork burdens and costs. On April 13, 1988, OMB extended until April 1991 the approval of all provisions except the three that were previously disapproved.

In accordance with the Paperwork Reduction Act and its implementing regulations issued by OMB (5 CFR Part 1320), OSHA certifies that it has submitted the information collection requirements contained in this proposed revision to its current standards to OMB for review under section 3504(h) of that Act. Comments on these information collection requirements may be submitted by interested parties to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Occupational Safety and Health Administration, 726 Jackson Place, NW., Washington, DC 20503. OSHA requests that copies of such comments also be submitted to the OSHA Docket Office as part of the record for this rulemaking.

\* \* \* \* \*

Order of The Supreme Court Granting The Writ of Certiorari

**Supreme Court of the United States**

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No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

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ORDER ALLOWING CERTIORARI. Filed May 15,  
1989.

The petition herein for a writ of certiorari to the United  
States Court of Appeals for the Third Circuit is granted.

May 15, 1989

(14)  
No. 88-1434

Supreme Court, U.S.  
**FILED**  
JUN 29 1988

JOSEPH E. SPANIO  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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**ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS**

**v.**

**UNITED STEELWORKERS OF AMERICA, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT**

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**BRIEF FOR THE PETITIONERS**

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#### QUESTION PRESENTED

The Paperwork Reduction Act of 1980 requires, among other matters, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved three provisions of the Secretary of Labor's hazard communication standard, which requires employers to communicate chemical hazard information to their employees. The question presented, which arises in a contempt action against the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health, is whether the Paperwork Reduction Act's review process applies to agency regulations, developed as part of the agency's statutory mission, that require regulated entities to collect information for disclosure to third parties.

## PARTIES TO THE PROCEEDINGS

The petitioners are the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health. The following additional parties participated in the proceedings below: the United Steelworkers of America; Public Citizen, Inc.; Building and Construction Trades Department, AFL-CIO; Associated Builders and Contractors, Inc.; Associated General Contractors of America; Construction Industry Trade Associations; and United Technologies Corporation.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR THE PETITIONERS

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 855 F.2d 108.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-17a) was entered on August 19, 1988. Petitions for rehearing were denied on November 28, 1988 (Pet. App. 18a-21a). The petition for a writ of certiorari was filed on Monday, February 27, 1989, and was granted on May 15, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the addendum to this brief (Add., *infra*, 1a-25a).

## STATEMENT

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, requires, among other matters, that the Director of the Office of Management and Budget (OMB) review federal agency information collection requirements to determine whether they are necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved three provisions of the Secretary of Labor's revised hazard communication standard, which requires employers to communicate chemical hazard information to their employees. The United Steelworkers of America and Public Citizen, Inc. (respondents), challenged the disapproval by seeking contempt sanctions against the Director of OMB and the Secretary of Labor, arguing that OMB lacked authority under the PRA to disapprove the pertinent provisions and that the Secretary violated prior court orders when she acceded to OMB's review and disapproval. The court of appeals, while declining to hold the Director or the Secretary in contempt, agreed with the attack on OMB's authority and invalidated the disapproval.

## A. The Paperwork Reduction Act

The PRA is intended to minimize the burden and maximize the usefulness of the federal government's many demands for the collection and dissemination of information. See 44 U.S.C. 3501 (1982 & Supp. IV 1986). The PRA assigns principal responsibility for this task to the Director of OMB, who is accountable, among other matters, for establishing federal information policies and overseeing their implementation. See 44 U.S.C. 3504(a) and (b) (1982 & Supp. IV 1986). Specifically, the Director is charged with developing an "information collection request" clearance process, in which he is to review and ap-

prove "information collection requests proposed by agencies" and to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency" (44 U.S.C. 3504(c)).

The PRA defines the key term "information collection request" as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). Of the three methods of principal relevance here—reporting requirements, recordkeeping requirements and collection of information requirements—the PRA provides further explanation of the last two. It defines "recordkeeping requirement" as a "requirement imposed by an agency on persons to maintain specified records" (44 U.S.C. 3502(17) (Supp. IV 1986)). And it defines the term "collection of information" as:

the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either —

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. 3502(4).

The PRA provides that each federal agency "shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner and for complying with the information policies, principles, standards, and guidelines prescribed by the Director." 44 U.S.C. 3506(a). Furthermore, a federal agency "shall not conduct or sponsor the collection of information" unless the agency (1) has taken action to reduce the paperwork burden; (2) has submitted the proposed information request and associated material to the Director of OMB; and (3) "the Director has approved the proposed information collection request, or the period for [the Director's] review of information collection requests \* \* \* has elapsed." 44 U.S.C. 3507(a) (1982 & Supp. IV 1986).<sup>1</sup>

The statute provides that before the Director approves a proposed "information collection request"—by determining that the collection of information by an agency is "necessary for the proper performance of the functions of the agency" and "will have practical utility"—he "may give the agency and other interested persons an opportunity to be

<sup>1</sup> Section 3504(h)(1) requires an agency to submit a copy of a proposed rule containing collection of information requirements to the Director no later than the date of the publication of the notice of proposed rulemaking. 44 U.S.C. 3504(h)(1). The Director then has 60 days in which to file public comments on the rule's collection of information requirements. 44 U.S.C. 3504(h)(2). In publishing its final rule, the agency must "explain how any collection of information requirement contained in the final rule responds to the comments \* \* \* or explain why it rejected those comments." 44 U.S.C. 3504(h)(3). The Director may disapprove any collection of information requirement contained in a final rule if the agency has failed to comply with Section 3504(h)(1)'s submission requirements, if the Director determines that the agency's response to his comments is unreasonable, or if the agency has substantially modified the collection of information requirement contained in the proposed rule. 44 U.S.C. 3504(h)(5)(B), (C) and (D).

heard or to submit statements in writing." 44 U.S.C. 3508. If, however, the Director determines that the collection of information by an agency "is unnecessary, for any reason, the agency may not engage in the collection of the information." *Ibid.*<sup>2</sup>

The PRA instructs the Director of OMB to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. 3516. The PRA also specifies the effect of the Act on existing law. It states:

Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

44 U.S.C. 3518(a). The PRA further provides:

Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

44 U.S.C. 3518(e).

#### B. The OMB Regulations

The Director of OMB has promulgated regulations, pursuant to 44 U.S.C. 3516, implementing the PRA. See

<sup>2</sup> The PRA provides that, in the case of independent regulatory agencies, the Director's disapproval "may be voided, if the agency by a majority vote of its members overrides the Director's disapproval" (44 U.S.C. 3507(c)).

5 C.F.R. 1302.1 *et seq.* The regulations, which were first issued in 1983 (48 Fed. Reg. 13,689) and were revised in 1988 (53 Fed. Reg. 16,618, 16,623), interpret the statute's requirements and provide additional practical guidance on the meaning of statutory terms and the manner in which OMB conducts its paperwork review.<sup>3</sup>

For example, the OMB regulations provide extensive guidance on the practical application of the statutory term "collection of information." See 5 C.F.R. 1320.7(c). As explained above, the PRA defines this term as "the obtaining or soliciting of facts or opinions by an agency" (44 U.S.C. 3502(4)). The OMB regulations interpret that phrase as including "any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). More specifically, the OMB regulations explain:

Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.\* \* \*

5 C.F.R. 1320.7(c)(2).

The PRA also specifies that an "information collection request" may be conducted through various means, including "reporting or recordkeeping requirement[s] \* \* \* or other similar method[s] calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). The OMB

<sup>3</sup> In this brief, we cite the revised OMB regulations as they will appear in the 1989 Code of Federal Regulations. Our petition for a writ of certiorari cited the regulations as they appear in the 1988 Code of Federal Regulations.

regulations interpret the term "recordkeeping requirement" to include "requirements that information be maintained or retained by persons *but not necessarily provided to an agency*" (5 C.F.R. 1320.7(p) (emphasis added)). And the regulations define "reporting requirement," a term not otherwise defined in the statute, to mean "a requirement imposed by an agency on persons to provide information *to another person or to the agency*" (5 C.F.R. 1320.7(q) (emphasis added)).<sup>4</sup>

The OMB regulations set forth the general requirements that an agency must meet to obtain the Director's approval, pursuant to 44 U.S.C. 3507 and 3508 (1982 & Supp. IV 1986), of an "information collection request." See 5 C.F.R. 1320.4. First, an agency must demonstrate, in accordance with the statutory criteria, that "it has taken every reasonable step" to ensure that:

(1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and

<sup>4</sup> The OMB regulations further explain that "[s]imilar methods may include contracts, agreements, policy statements, *plans*, information collection requests, collection of information requirements, rules or regulations, information collection requests or collection of information requirements contained in, derived from, or authorized by such rules or regulations, *planning requirements*, circulars, directives, *instructions*, bulletins, requests for proposal or other procurement requirements, interview guides, oral communications, *disclosure requirements*, *labeling requirements*, telegraphic or telephonic requests, automated collection techniques, and standard questionnaires used to monitor compliance with agency requirements." 5 C.F.R. 1320.7(c)(1) (emphasis added).

(3) The collection of information has practical utility. \* \* \*.

5 C.F.R. 1320.4(b). Next, OMB will determine, in accordance with 44 U.S.C. 3508, "whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions." 5 C.F.R. 1320.4(c). "In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility." 5 C.F.R. 1320.4(c).<sup>5</sup> Finally, "OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation." 5 C.F.R. 1320.4(c)(1).

### C. The Present Dispute

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651(b)). To accomplish this goal, the OSH Act authorizes the Secretary of Labor "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce" (29 U.S.C. 651(b)(3)). These standards "require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

<sup>5</sup> "In determining whether information will have 'practical utility,' OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." 5 C.F.R. 1320.7(o).

reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 U.S.C. 652(8)). See 29 U.S.C. 655. The Secretary has promulgated numerous standards regulating occupational exposure to various chemical hazards. See 29 C.F.R. 1910.1000-1910.1101. This suit arises out of the Secretary of Labor's efforts to promulgate a comprehensive hazard communication standard, pursuant to the OSH Act, for the purpose of "ensur[ing] that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees" (29 C.F.R. 1910.1200(a)(1)). The question is whether the Secretary's hazard communication standard is subject to OMB review in accordance with the PRA.<sup>6</sup>

The Secretary first published a hazard communication standard in 1983. That standard, which was limited to the manufacturing sector of the economy, required covered employers to inform their employees of all hazardous substances to which they are exposed in the workplace through the use of container labels, material safety data sheets (MSDSs), and employee training programs. See 29 C.F.R. 1910.1200(a)(2) (1984); 48 Fed. Reg. 53,280 (1983). OMB reviewed and approved the standard under the PRA (*ibid.*). A number of states and employee interest groups objected to the standard on various other grounds and sought judicial review.<sup>7</sup>

<sup>6</sup> The parties have set forth the Secretary's hazard communication standard, as presently in effect, as well as excerpts of certain federal register notices, in the joint appendix.

<sup>7</sup> The OSH Act specially provides for judicial review of occupational safety and health standards in the court of appeals, and it further provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. 655(f).

The court of appeals rejected most of the challenges to the Secretary's hazard communication standard. See *United Steelworkers of America v. Auchter (USWA I)*, 763 F.2d 728 (3d Cir. 1985). The court disagreed, however, with the Secretary's decision to limit the standard's coverage to the manufacturing sector. The Secretary had explained that he was limiting the standard's coverage based on his determination "to first regulate those industries with the greatest demonstrated need" (48 Fed. Reg. at 53,286). The court concluded, however, that there was record evidence justifying extension of the standard to the non-manufacturing sectors. It therefore directed the Secretary:

to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

*USWA I*, 763 F.2d at 736-738, 739.

In response to the court's order, the Secretary reopened the record to gather additional evidence about the economic and technological feasibility of applying the hazard communication standard to non-manufacturing industries. See 50 Fed. Reg. 48,794 (1985). Based on this newly acquired evidence and on the previous rulemaking record, the Secretary initiated a new rulemaking, with the expectation that this would result in a final rule in early 1988. See 52 Fed. Reg. 31,852, 31,854 (1987). Respondents, who were among the parties to the *USWA I* litigation, objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the

existing record and directed, under threat of contempt sanctions, that the Secretary:

within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

*United Steelworkers of America v. Pendergrass (USWA II)*, 819 F.2d 1263, 1270 (3d Cir. 1987) (footnote omitted). Although the federal government disagreed with that ruling, the Solicitor General, after rehearing was denied, determined not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852. In addition to the extended coverage, the revised standard included several modifications to the original standard designed to make the standard more suitable to the non-manufacturing sector. *Id.* at 31,860. On September 10, 1987, the Department of Labor requested that OMB approve the paperwork requirements associated with the revised standard. Shortly thereafter, OMB held a public meeting, pursuant to the PRA, to solicit comments on the recordkeeping, disclosure, and other paperwork requirements of the revised standard. See 52 Fed. Reg. 36,652 (1987). Subsequently, on October 23, 1987, OMB notified the Department of Labor that it approved all of the proposed regulations, estimated to impose 54 million "burden hours" of paperwork annually, with the exception of three particular

provisions that the Secretary had added to the standard. Pet. App. 22a-44a. It specifically disapproved: (1) "the requirement that [MSDSs] be provided on multi-employer worksites" either through the exchange of MSDSs among employers or their maintenance at a central location at the worksite; (2) the paperwork requirements resulting from "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" (*i.e.*, "any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product" (*id.* at 36a)); and (3) the paperwork requirements stemming from "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. *Id.* at 25a, 43a. See 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), and (e)(2)(i) (1988).

OMB's disapproval of the first requirement was based on its determination that either of the options provided for in the regulations—mandatory exchange of potentially huge numbers of MSDSs at the worksite or depositing this information at a central location on the worksite—would impose substantial paperwork requirements but would have little, if any, practical utility. See Pet. App. 30a-33a. OMB determined that the relevant information could be made available through less burdensome means. As for the other disapprovals, although OSHA had provided a limited exemption for consumer products if used in the same manner as in normal consumer use, and a limited exemption for drugs in solid form (*i.e.*, tablets or pills), OMB concluded that these exemptions did not go far enough. Specifically, OMB found that the remaining requirements would substantially duplicate the disclosures required by the Consumer Product Safety Commission

(CPSC), would be inconsistent with Environmental Protection Agency (EPA) requirements for consumer products, and would needlessly replicate existing Food and Drug Administration (FDA) disclosures required for drugs. See *id.* at 33a-38a. OMB instructed the Secretary "to revise these requirements \* \* \* or collect new information that would warrant a reconsideration of our decision" (*id.* at 26a).<sup>8</sup>

Respondents returned once again to the court of appeals and requested that court to hold the Secretary of Labor and the Director of OMB (who was not a party to the 1985 or 1987 litigation) in contempt. They argued that the Secretary violated the earlier orders when she acceded to OMB's review and disapproval of portions of the standard, and, more fundamentally, that OMB lacked authority under the Paperwork Reduction Act to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while declining to hold the Secretary or the Director in contempt, agreed with the attack on OMB's authority and invalidated the disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America v. Pendergrass (USWA III)*, Pet. App. 1a-13a. The court recognized that the Paperwork Reduction Act authorizes

<sup>8</sup> On January 14, 1988, the Department of Labor notified OMB that it would initiate a new rulemaking, but further explained that it would not be possible to complete the rulemaking by March 1, 1988, the date specified by OMB. Pet. App. 27a, 45a-48a. In early March, the Department of Labor requested that OMB renew its 1983 approval of the hazard communication standard's paperwork requirements. On April 13, 1988, OMB approved all of the hazard communication standard's paperwork requirements except the three previously disapproved provisions. *Id.* at 49a-58a. The Department of Labor subsequently solicited public comment and has held hearings on what modifications (if any) should be made in light of OMB's disapproval. See 53 Fed. Reg. 29,822 (1988).

OMB to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c)(2)). See Pet. App. 7a. It held, however, that the pertinent provisions of the hazard communication standard "are insulated from OMB authority" because they do not "require the 'collection of information' " and they "embod[y] substantive policy decision making entrusted to [the Secretary of Labor]" (*id.* at 8a).

The court of appeals first reasoned that the two provisions dealing with consumer products and drugs are "exemptions from the labeling requirements of the hazard communication standard" (Pet. App. 9a (emphasis in original)) and that "[w]hatever else the terms 'collection of information' or 'information collection requests' may refer to, they cannot possibly refer to these exemptions from labeling requirements" (*ibid.*). The court then concluded that the disapproved provision dealing with information exchange at multi-employer worksites does not involve a "collection of information" because it "requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*). The court stated that "[t]he exchange requirement no more constitutes the collection of information within the meaning of the [PRA] than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers" (*id.* at 11a). The court added that its conclusion was "reinforced" by other language in the PRA that "disaffirms the intention to grant substantive lawmaking authority to OMB" (*ibid.*).

Having addressed the merits, the court of appeals then turned to the question whether the employee groups were entitled to challenge OMB's disapproval through a contempt motion directed at the Secretary of Labor, rather than bringing an action for review of OMB's action pur-

suant to the Administrative Procedure Act. The court reasoned that the Secretary's withdrawal of the disapproved provisions was inconsistent with the court's prior orders and that relief by motion was therefore appropriate. Pet. App. 12a-13a.

#### SUMMARY OF ARGUMENT

The Secretary of Labor's hazard communication standard requires employers to collect and retain chemical hazard information and to communicate that information to their employees. The question in this case is whether the Paperwork Reduction Act (PRA) authorizes OMB to review the paperwork burdens imposed by that standard. The Secretary, proceeding in conformity with OMB's regulations and established government practices, submitted the hazard communication standard to OMB for examination and later notified the regulated parties that three disapproved provisions would not go into effect. The court of appeals held, however, that the Secretary's action was improper because OMB lacked authority to review the relevant provisions. The court's decision in this case, which respondents have aptly described as an "idiosyncratic proceeding" (USWA Br. in Opp. 11), is wrong and, if left uncorrected, would seriously compromise a congressionally prescribed mechanism for improving government regulations.

1. The PRA, by its terms, indicates that OMB is required to review the Secretary of Labor's hazard communication standard. The PRA expressly directs OMB to "review[] and approv[e] information collection requests proposed by agencies" (44 U.S.C. 3404(c)(1)), and it expressly defines an "information collection request" as, among other things, a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of informa-

tion" (44 U.S.C. 3502(11) (Supp. IV 1986)). The hazard communication standard, and in particular the three disapproved provisions, fall within that definition. The provisions, which require employers to compile, disclose, and distribute chemical hazard information for the benefit of their employees, impose "reporting," "recordkeeping," and "collection of information" requirements. The PRA directs review by OMB of these requirements irrespective of whether the information is provided to the government or directly to third parties.

OMB's implementing regulations likewise define a "collection of information" requirement to include regulatory provisions such as the hazard communication standard. OMB's regulations state, among other things, that a "collection of information" requirement includes an agency demand that persons "obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). OMB's interpretation is clearly reasonable and entitled to judicial deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Deference is particularly appropriate because OMB was intimately involved in the creation of the legislation, its interpretation reflects the construction of the statute by the expert agency charged with its implementation, and OMB has consistently adhered to that interpretation.

2. The court of appeals erred in concluding that the PRA does not give OMB "authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (Pet. App. 10a). The PRA specifically instructs OMB to determine whether the agency's proposed collection of information "is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c)(2), 3508). The court of appeals' reliance on other provisions of the PRA which require OMB to exercise its

authority in accordance with existing law (44 U.S.C. 3504(a) (1982 & Supp. IV 1986)) and which provide that the PRA should not be interpreted to increase or decrease OMB's authority with respect to "substantive policies and programs" (44 U.S.C. 3518(e)), is misplaced. Those general provisions do not rescind the express statutory requirement that OMB review whether an agency has chosen effective information collection methods to achieve its regulatory objectives.

The government's position is not only consistent with the statutory language, it promotes Congress's express goal of minimizing paperwork burdens and maximizing the usefulness of government information collection activities. OMB's centralized review of agency information collection requests improves agency decisionmaking by providing an objective "second look" at the agency's information collection requirements to assure that they are useful, are not unduly burdensome, and do not duplicate the requirements imposed by other laws or regulations. The court of appeals' invalidation of this valuable intra-governmental review process only frustrates the development of well-reasoned rules. That result would not only thwart Congress' objectives and the Executive Branch's functions, but it would also increase the Judicial Branch's workload in reviewing potentially defective agency action.

3. This Court need not consult the PRA's legislative history to resolve this case. Nevertheless, the legislative record contains powerful support for OMB's authority to review information collection requests such as the hazard communication standard. The hearings and committee reports indicate that Congress intended the PRA to cover the types of information collection activities involved here and that OMB is entitled to review the paperwork obligations imposed by an agency in seeking to accomplish its "substantive" policies. The legislative history therefore

confirms that the disapproved provisions of the Secretary of Labor's hazard communication standard fall within the PRA's broad definition of information collection requests and that they are subject to OMB review.

#### ARGUMENT

##### THE PAPERWORK REDUCTION ACT DIRECTS OMB TO REVIEW THE DISAPPROVED PROVISIONS OF THE SECRETARY OF LABOR'S HAZARD COMMUNICATION STANDARD

Congress enacted the PRA to provide a mechanism for centralized governmental review of agency information collection requests. Detailed regulations implement the PRA and explain the scope of the statute's coverage. Based on the PRA's plain language and OMB's regulations, the Secretary of Labor's hazard communication standard, which requires regulated entities to compile, disclose, and distribute information, properly falls within the PRA's scope and is therefore subject to the Act's requirements.

The court of appeals concluded that OMB lacked authority to review the relevant provisions of the hazard communication standard and ruled that the Secretary's submission of the standard to OMB for PRA review therefore violated the court's previous orders. The court of appeals' decision thus squarely presents the question whether the PRA directs review by OMB of regulatory provisions, such as those involved here, that require entities to compile, disclose, and distribute information. We submit that the court's decision is inconsistent with the language of the PRA, pervasively conflicts with OMB's regulations and established government practices, and would defeat Congress's objective of improving the government's regulatory efforts. This Court should

reverse the judgment below and reinstate OMB's disapproval of the three relevant provisions of the hazard communication standard. The Secretary may then reevaluate and, if necessary, revise those provisions in response to OMB's concerns.<sup>9</sup>

##### A. The Paperwork Reduction Act And OMB's Implementing Regulations Establish That The Relevant Provisions Of The Hazard Communication Standard Are Information Collection Requests Subject To OMB Review And Approval

The central question in this case is whether the provisions of the hazard communication standard at issue constitute "information collection requests" that are subject to PRA review. The starting point for answering that question is, of course, the PRA's language. *E.g.*, *Community for Creative Non-Violence v. Reid*, No. 88-293 (June 5, 1989), slip op. 19. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Since Congress has set forth the PRA's general scope and ap-

<sup>9</sup> The question presented by our petition and decided by the court of appeals is whether the PRA authorizes OMB to review agency regulations, such as the three disapproved provisions in this case, that require regulated entities to collect information for disclosure to third parties. See Pet. i; Pet. App. 6a-7a. Because OMB directed the Secretary of Labor to reconsider the disapproved provisions (Pet. App. 25a-26a) and the court of appeals held OMB had no such authority, no question is presented at this juncture concerning whether those provisions should or should not ultimately be incorporated as part of the hazard communication standard. If this Court reverses the court of appeals' judgment, that question would arise in the subsequent administrative proceedings. See note 8, *supra*. If the Court affirms the court of appeals' judgment, the question would be moot.

plication in unusually comprehensive terms, the answer turns on a correspondingly narrow issue of statutory construction.

1. As we have explained, the PRA expressly directs OMB to "review[] and approv[e] information collection requests proposed by agencies" (44 U.S.C. 3504(c)(1)). The PRA expressly defines an "information collection request" as, among other things, a "reporting or record-keeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). The issue then is whether the hazard communication standard, and in particular the three disapproved provisions, fall within the express definition of an "information collection request."

Both the original and the revised hazard communication standards—which require employers to compile, disclose, and distribute chemical hazard information—involve a wide variety of "information collection requests." For example, both hazard communication standards require chemical manufacturers to develop hazard information, label their chemical containers, and prepare material safety data sheets (MSDSs) that are then sent to downstream employers that are engaged in businesses that use or distribute chemicals. See 29 C.F.R. 1910.1200(d), (f) and (g). Even though there is no requirement to send this information to the Department of Labor (or any other federal agency), these government-compelled obligations to compile, disclose, and distribute technical information impose—in common parlance and as specifically defined in the PRA—"reporting," "recordkeeping," and "collection of information" requirements.

Although the term "reporting requirement" is not specifically defined by the Act, the accepted definition of the verb "report" includes to "give an account of," "make a written record or summary of," "announce or relate as the

result of a special search [or] examination," and "give notification." *Webster's Third New International Dictionary* 1925 (1976). The adjective "reporting" denotes these same acts, which aptly describe the hazard communication standard's information disclosure and dissemination requirements. The PRA itself defines a "recordkeeping requirement" as a "requirement imposed by the agency to maintain specified records" (44 U.S.C. 3502(17) (Supp. IV 1986)), and it defines the "collection of information" as "the obtaining or soliciting of facts or opinions by an agency" through various means (44 U.S.C. 3502(4)). Thus, those terms encompass the hazard communication standard's compilation, disclosure, and distribution requirements. In addition, we note that there is a substantial overlap between the terms. See 44 U.S.C. 3502(4) (defining the collection of information to include soliciting facts or opinions through reporting or record-keeping requirements).

Both the original and the revised hazard communication standards also require chemical manufacturers and the downstream employers (1) to prepare a written hazard communication program that describes the manufacturer's or employer's general compliance plan and includes a list of hazardous chemicals known to be present at the worksite (29 C.F.R. 1910.1200(e)); (2) to ensure proper labeling of containers containing hazardous chemicals (29 C.F.R. 1910.1200(f)); and (3) to collect and maintain copies of the MSDSs for chemicals that they use and to make them readily accessible to employees (29 C.F.R. 1910.1200(g)). Chemical manufacturers and downstream employers are further required to provide information and training to their employees with respect to the requirements of the hazard communication standard and chemical hazards in the workplace. These government-compelled obligations to prepare instructions, and to col-

lect, disclose, and distribute information, similarly impose "reporting," "recordkeeping" and "collection of information" requirements. For example, the employers' obligation to disclose hazard information to their employees is a "reporting requirement," the obligation to compile copies of MSDSs is a "recordkeeping requirement," and the obligation to prepare a hazard communication program, including a list of hazardous chemicals, is a "collection of information requirement."

The three specific provisions at issue are an integral part of the hazard communication standard's "information collection requests" and accordingly are subject to PRA review. The first two provisions, which provide that the hazard communication standard "does not apply" to certain consumer products (29 C.F.R. 1910.1200(b)(6)(vii)) and certain FDA-regulated drugs (29 C.F.R. 1910.1200(b)(6)(viii)), are limited exemptions from the standard's general requirements. Since the scope of these exemptions determines the breadth of the hazard communication standard's reporting, recordkeeping, and collection of information requirements, they serve to define the scope of the standard's "information collection requests" and are subject to PRA review. The third provision, which obligates employers to exchange or centrally maintain MSDSs at multi-employer worksites, is itself an "information collection request" subject to PRA review. It plainly constitutes a recordkeeping requirement since it requires employers to collect documents and store them at a specific location.

We therefore submit that the PRA's specific terms demonstrate that OMB was fulfilling its statutory responsibility in reviewing the disapproved provisions of the hazard communication standard. The court of appeals was quite clearly wrong in concluding—without *any* supporting reasoning—that the first two provisions are

immunized from PRA review because the term "information collection requests" \* \* \* cannot possibly refer to these exemptions from labeling requirements" (Pet. App. 9a).<sup>10</sup> Since the hazard communication standard contains information collection requests, an exemption from those requests defines the scope of the paperwork obligation imposed by the agency and is subject to PRA review. The court of appeals also erred in concluding that the third disapproved provision is immune from PRA scrutiny. The court stated that "[t]he multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*), adding that the PRA is aimed exclusively "at reducing the burden of paperwork required by the federal government for its own regulatory or statistical purposes" (*id.* at 10a). That reasoning is incorrect.<sup>11</sup>

<sup>10</sup> The court of appeals mistakenly characterized these provisions as "exemptions from labeling requirements" (Pet. App. 9a). The exemptions involved here relieve the employer not only from labeling requirements (cf. 29 C.F.R. 1910.1200(b)(5)), but from all of the standard's requirements with respect to those products, including MSDS collection, retention and distribution, and employee training. In any event, labeling requirements are reporting requirements subject to OMB review. See 5 C.F.R. 1320.7(c).

<sup>11</sup> The court of appeals erred in stating that the multi-employer exchange provision does not require employers to compile information. Under that provision, an employer at a multi-employer worksite must either exchange MSDSs with other employers or, together with other employers, make their MSDSs available at a central worksite location. Either option surely entails the "compilation" of information. In any event, PRA review authority does not turn on distinctions between compilation and transmittal of information. The PRA instructs the OMB to "review[] and approv[e] information collection requests proposed by agencies" (44 U.S.C. 3504(c)(1)). The multi-employer exchange provision clearly is an information collection request because it imposes, at a minimum, a "recordkeeping requirement" (44 U.S.C. 3502(11) (Supp. IV 1986)).

As we have explained, the PRA expressly defines the term "information collection request" to include methods, such as reporting or recordkeeping requirements, "calling for the collection of information" (44 U.S.C. 3502(11) (1982 & Supp. IV 1986)). That definition indicates that the PRA's review provisions are triggered by a government request for information collection, regardless of whether the party charged with gathering the information is required to retain it, transmit it to the government, or disseminate it to third parties. The PRA's definition of the term "collection of information" echoes that point. It defines that term disjunctively to include "the obtaining or soliciting of facts or opinions by an agency" (44 U.S.C. 3502(4) (emphasis added)). Thus, an agency request that parties gather or develop facts or opinions results in a "collection of information" regardless of whether the government—or some other entity—ultimately obtains the resulting data.

Indeed, the court of appeals' suggested distinction between the paperwork associated with the hazard communication standard and "paperwork required by the federal government for its own regulatory or statistical purposes" (Pet. App. 10a) is illusory. The Secretary of Labor has no authority to require "paperwork" *except* for "regulatory purposes." The hazard communication standard and its associated information collection requests are intended to promote the Secretary's regulatory objective of informing employees of workplace chemical hazards.<sup>12</sup>

<sup>12</sup> The court of appeals also suggested in dicta that even "the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers" do not constitute "the collection of information within the meaning of the [PRA]" (Pet. App. 11a). As we have explained (see pp. 20-22, *supra*), those reporting and recordkeeping requirements are plainly subject to PRA review.

By the same token, respondents' suggestion that PRA review "applies only to information collected for governmental use" (USWA Br. in Opp. 19) also fails. The government certainly "uses" the hazard communication standard's information collection requests to promote employer communication of workplace chemical hazards. In fact, the government itself has direct access to the resulting collections of information to fulfill its enforcement responsibilities under the OSH Act.<sup>13</sup> Thus, respondents' argument necessarily reduces to an assertion that the PRA should not apply where the government imposes information collection requests primarily to provide direct disclosure of information to third parties. The PRA's definition of the term "information collection request" indicates, however, that the PRA does apply in that circumstance.

2. We submit that the PRA is sufficiently clear that the judgment of the court of appeals should be reversed on the basis of the statutory language alone. See *Bethesda Hospital Ass'n v. Bowen*, 108 S. Ct. 1255, 1258 (1988). But even if the PRA were silent or ambiguous with respect to the specific issue, a court should not "simply impose its own construction on the statute" (*Chevron U.S.A.*, 467 U.S. at 843). It is well settled that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" (*id.* at 844). OMB, which is charged with implementing the PRA, has issued regulations that provide specific guidance on the question presented in this case. The agency's interpretation is controlling if it "is based on a permissible construction of the statute" (*id.* at 843).

<sup>13</sup> The hazard communication standard specifically provides that an employer must make the written hazard communication program and MSDSs available, upon request, to the Assistant Secretary. See 29 C.F.R. 1910.1200(e)(4) and (g)(11).

OMB prepared its regulations in accordance with Congress's express directive to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. 3516. Those regulations (which the court of appeals did not even acknowledge) specifically and unambiguously address the precise question at issue in this case: whether the critical statutory term "information collection request"—which is defined to include a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information"—includes agency initiatives requiring the collection of information for disclosure to third parties.

The regulations give considerable attention to the meaning of the term "collection of information." They recognize that the PRA defines a "collection of information" to include "the obtaining or soliciting of facts or opinions by an agency through the use of \* \* \* reporting or recordkeeping requirements, or other similar methods" (44 U.S.C. 3502(4)). See 5 C.F.R. 1320.7(c). But the regulations explain, in accordance with the common meaning of the words used, that the "soliciting of facts or opinions" can include an agency demand that persons "obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). OMB's regulations further state:

Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of

information" if the information were directly provided to the agency. \* \* \*.

5 C.F.R. 1320.7(c)(2). OMB's implementing regulations thus construe a "collection of information" requirement to include regulations such as the Secretary of Labor's hazard communication standard.

The regulations also define the other terms that are included in the definition of an "information collection request" in such a manner as to make clear that they apply to information collected for the benefit of third parties. OMB's regulations specify that a "reporting requirement" can include an agency requirement that a person "provide information to another person" (5 C.F.R. 1320.7(q)), and that a "recordkeeping requirement" can include an agency requirement "that information be maintained or retained by persons but not necessarily provided to an agency" (5 C.F.R. 1320.7(p)). They also provide that "similar methods" can include "disclosure requirements," "labeling requirements," "plans," and "instructions" (5 C.F.R. 1320.7(c)(1)). See note 4, *supra*. There can be little doubt then that under OMB's regulations the hazard communication standard's provisions requiring employers to communicate hazard information to employees through compilation and maintenance of MSDSs, labeling, and written training requirements constitute an information collection request. Furthermore, that interpretation is clearly reasonable and entitled to judicial deference. *Chevron U.S.A.*, 467 U.S. at 843-845. As this Court recently observed, where "the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988).

In this case, OMB's regulatory interpretation is not only the most sensible construction of the specific language at

issue, but it also is manifestly consistent with the PRA's objectives, as expressed by "the language and design of the statute as a whole." *K mart Corp.*, 108 S. Ct. at 1817. The PRA's stated purpose is to minimize the public's paper-work burdens while maximizing the usefulness of information that must be collected, maintained, or disseminated pursuant to federal requirements. 44 U.S.C. 3501 (1982 & Supp. IV 1986). These objectives are no less relevant and important when a federal agency requires persons to collect information and disseminate it to third persons, than when an agency requires such persons to collect information and transmit it to the agency itself. Indeed, the D.C. Circuit recently recognized that point in *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (1988), petition for cert. pending, No. 88-849. In *Action Alliance*, OMB had exercised its authority under the PRA's predecessor statute—the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.* (1976)—to disapprove, in part, a Department of Health and Human Services regulation requiring federal funds recipients to perform a "self-evaluation" of their compliance with the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, and to make that self-evaluation available on request to the agency and the public. The court of appeals affirmed OMB's action, rejecting as "pure pettifoggery" (846 F.2d at 1453) the appellants' claim that the term "collection of information" includes only data submitted to the agency. The court explained:

Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the record-keeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of informa-

tion" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used or be available for use in the collection of information." \* \* \* Even under the deference we owe the agency, \* \* \* we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collection of information." Happily we confront no such oddity.

846 F.2d at 1453-1454.<sup>14</sup>

OMB's regulatory interpretation is not only sensible, it also has other characteristics that counsel in favor of judicial deference. For example, OMB was intimately involved in the creation of the legislation. See *Miller v. Youakim*, 440 U.S. 125, 144 (1979); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). See pp. [38-41], *infra*. This Court has noted that "[a]dministrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." *Youakim*, 440 U.S. at 144. In addition, OMB's

<sup>14</sup> As the D.C. Circuit recognized, OMB's interpretation is an extension of the Bureau of the Budget's practices under the PRA's predecessor statute, the Federal Reports Act. The Bureau of the Budget, and later OMB, interpreted the Federal Reports Act to require "clearance" of agency "plans or forms" used to conduct or sponsor the collection of information. See Bureau of the Budget Regulation A (Feb. 13, 1943). We have reproduced Regulation A, which the D.C. Circuit quotes, in the Addendum to this brief. See pp. 16a-25a, *infra*. As the court noted, Regulation A specifically defined a "plan" to include "[a]ny general or specific requirement for the establishment or maintenance of records \* \* \* which are to be used or be available in the collection of information." See Add., *infra*, 17a. Thus, OMB and its predecessor, the Bureau of the Budget, have reviewed record-keeping requirements that do not entail the transmission of information to the agency for nearly 50 years.

regulations represent the construction of a statute by an agency " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933)).

Furthermore, as our petition for a writ of certiorari explained, OMB has consistently applied its regulatory interpretation to a wide variety of information collection activities similar to those presented in this case, including Environmental Protection Agency (EPA) community right-to-know disclosures (52 Fed. Reg. 38,344 (1987)), Federal Trade Commission (FTC) textile fiber products identification disclosures and fair packaging and labeling disclosures (53 Fed. Reg. 5986 (1988); *id.* at 13,159), and Food and Drug Administration (FDA) nutrition labels (52 Fed. Reg. 28,607 (1987)), as well as numerous other federally mandated disclosures. See Pet. 17-18. Indeed, as the D.C. Circuit recognized, OMB's interpretation is an extension of the Bureau of the Budget's established practices under the PRA's predecessor statute, the Federal Reports Act of 1942. "This longstanding and consistent interpretation is entitled to considerable weight." *Zenith Radio Corp. v. United States*, 437 U.S. at 450.<sup>15</sup>

Finally, we consider it significant that OMB and the Secretary of Labor have consistently agreed that the

<sup>15</sup> Congress amended and reenacted the PRA since OMB's 1983 promulgation of its regulations, see Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, Tit. VIII, 100 Stat. 3341-335, yet in so doing gave no indication that it disagreed with OMB's interpretation. Congress's failure to criticize or overrule the agency's 1983 regulations provides an additional basis for inferring that OMB has correctly gauged Congress's intent. See, e.g., *United States v. Rutherford*, 442 U.S. 544, 554 (1979).

hazard communication standard is subject to PRA review. The Secretary's notices of proposed rulemaking and final rules have uniformly recognized that OMB review is required by the PRA. See 47 Fed. Reg. 12,092, 12,111 (1982) (J.A. 36-37); 48 Fed. Reg. 53,280 (1983) (J.A. 38-39), 52 Fed. Reg. 31,852, 31,870 (1987) (J.A. 40, 47-48); 53 Fed. Reg. 29,822, 29,826, 29,849-29,850 (1988) (J.A. 49, 63-64, 102-103). When two Executive Branch agencies agree that intra-governmental review is proper in developing an effective regulation, courts should be especially reluctant to interfere with that cooperative process.

#### B. OMB's Review Does Not Impermissibly Increase OMB's Authority With Respect To The Substantive Policies And Programs Of The Department Of Labor

The court of appeals offered a second reason for denying OMB authority to review the relevant provisions of the Secretary of Labor's hazard communication standard. The court suggested that the PRA does not give OMB "authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (Pet. App. 10a). See also Pet. App. 8a, 11a. The court's interpretation of the PRA is incorrect and would defeat the PRA's basic purposes.

1. Section 3508 of the PRA sets forth the standard that OMB must apply in reviewing information collection requests. It states in relevant part:

Before approving a proposed information collection request, [OMB] shall determine *whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.* \* \* \*. To the extent, if any, that the Director

determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

44 U.S.C. 3508 (emphasis added). See also 44 U.S.C. 3504(c). Thus, the PRA states in the clearest possible terms that OMB shall review agency information collection requests specifically to determine whether the agency's proposed paperwork requirements are necessary to accomplish the agency's functions. Indeed, the Act specifically provides that "the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter" (44 U.S.C. 3518(a) (emphasis added)).

The court of appeals' contrary conclusion apparently resulted from its exclusive focus on two other provisions of the PRA, Sections 3504(a) and 3518(e). Section 3504(a), which describes OMB's general responsibilities under the PRA, states that OMB shall exercise its authority "consistent with applicable law." Section 3518(e), which describes the PRA's relationship to other laws, states that the statute shall not be interpreted "as increasing or decreasing the authority of the President, [OMB], or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices." These provisions, particularly when read in conjunction with Section 3508 and Section 3518(a), do not support the court of appeals' conclusion.

Section 3504(a)'s general requirement that OMB exercise its authority "consistent with applicable law" does not prevent OMB from discharging its statutorily conferred responsibility to disapprove agency information collection requests that are not "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508).

The "consistency" provision obviously should not be read to rescind other provisions of the PRA. To hold otherwise "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). Rather, the "consistent with applicable law" provision simply directs OMB to carry out its various regulatory and information management activities in accordance with such generally applicable statutes as the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the Privacy Act of 1974, 5 U.S.C. 552a, and government procurement laws. In any event, since the PRA requires OMB to disapprove unnecessary information collection requests, and we know of no laws requiring agencies to collect information that they do *not* need "for the proper performance" of their functions, OMB's exercise of its disapproval authority necessarily is "consistent with applicable law."

OMB's disapproval authority also is entirely compatible with Section 3518(e). The court of appeals interpreted that provision, which counsels that the PRA should not be interpreted as increasing or decreasing OMB's authority "with respect to the substantive policies and programs" of other agencies (44 U.S.C. 3518(e)), as "disaffirm[ing] the intention to grant substantive lawmaking authority to OMB" (Pet. App. 11a). But as this Court recently explained, "the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2124 (1988). See also *Mistretta v. United States*, 109 S. Ct. 647, 655 (1989).

In the case of the PRA, Congress drew a distinction between OMB's statutory duties—including its expressly defined authority to disapprove burdensome and un-

necessary paperwork requirements—and other activities unrelated to paperwork reduction. What the substantive/non-substantive distinction means in this context, therefore, is simply that OMB's authority over an agency's policies and procedures under the PRA extends *only* to the review of information collection requests, and no further. The distinction does not—and could not—mean that OMB has *no* authority under the PRA to redirect agency policies and programs insofar as they entail excessive or burdensome paperwork requirements.<sup>16</sup> As in the case of Section 3504(a), construing Section 3518(e) in that fashion would result in imputing to Congress an improbable intent to “paralyze” the PRA's information collection review process. *Clark*, 332 U.S. at 489.<sup>17</sup>

<sup>16</sup> As commentators have recognized, because the PRA expressly gives OMB broad authority to determine whether information is necessary for the proper performance of an agency's functions, OMB review inevitably will affect agency activities, including policies and programs that might be deemed—in the abstract—to be “substantive.” See Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 104-110 (1987); Note, *The Paperwork Reduction Act in United Steelworkers v. Pendergrass: Undue Restriction and Unrealized Potential*, 89 Colum. L. Rev. 920, 931-932 (1989). As those commentators also have recognized, Congress must have intended that result. See Funk, *supra*, 24 Harv. J. on Legis. at 108 (“This second-guessing by OMB seems clearly intended by the Act.”); Note, *supra*, 89 Colum. L. Rev. at 932 (“It would be illogical to assume Congress did not recognize that such broad OMB powers would have an impact on other Agency mandates.”).

<sup>17</sup> Respondent Public Citizen has suggested that “[e]ntirely aside from OMB's responsibilities under the PRA, OMB has sweeping authority under Executive Orders 12,291 and 12,498 to supervise comprehensively the development of any regulatory action that imposes a paperwork requirement” (P.C. Br. in Opp. 4), and “to review any information collection and dissemination activities imposed by an Executive Branch agency” (*id.* at 7). Under that view, the PRA's grant of

2. The court of appeals thus erred in concluding that the PRA does not require OMB to review “the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies” (Pet. App. 10a). The statutory text plainly imposes such an obligation. Sections 3504, 3508, and 3518 are completely compatible and, when read in context, they produce a harmonious and sensible result. As a general matter, they recognize that while an agency has authority to determine, in accordance with its statutory mandate, its regulatory objectives, OMB is required to review whether the agency has chosen effective information collection methods to achieve those objectives. That result is consistent with the statutory language and promotes Congress's express objective of minimizing the paperwork burden and maximizing the usefulness of government information collection activities. See 44 U.S.C. 3501 (1982 & Supp. IV 1986).

The court of appeals' reasoning in this respect rests on a deeper fallacy. Far from “thwarting” or “frustrating” agency policymaking prerogatives, OMB's centralized review of information collection requests improves agency decisionmaking. OMB has developed expertise in the specialized discipline of information management. See generally *Information Management in Public Administration* (F. Horton & D. Marchand ed. 1982). Its role as a government-wide reviewer of agency information collection requests gives it an especially knowledgeable perspective on the effectiveness and practical utility of agency paperwork requirements. And it can provide special insights based on its familiarity with other information collection activities within the government. See generally

disapproval power would not, in any event, result in any increase in OMB's “authority . . . with respect to the substantive policies and programs of departments, agencies, and offices” (44 U.S.C. 3518(e)).

*Sierra Club v. Costle*, 657 F.2d 298, 404-408 (D.C. Cir. 1981). Thus, by allowing OMB to provide an objective "second look" at an agency's collection of information requirements in order to assure that they are useful, are not unduly burdensome, and do not duplicate the requirements imposed by other laws or regulations, the PRA's review process improves the quality of the agency's efforts to implement its own programs and policies.

OMB's review of the three disapproved provisions in this case illustrates how that process was meant to work and how it can provide a valuable mechanism for improving agency decisionmaking. In extending the hazard communication standard to embrace the entire economy, the Secretary modified the standard's requirements in light of a number of situations that generally are not encountered in the manufacturing sector. See 52 Fed. Reg. 31,852 (1987) (J.A. 40-47). The Secretary of Labor determined, among other matters, that the standard should assure that employees at multi-employer worksites have access to hazard information concerning all of the hazards at the site and that the standard should provide an exemption from its coverage for consumer products and drugs that do not present genuine workplace hazards. *Ibid.* OMB did not disagree with those determinations. Rather, its review was limited to whether the paperwork requirements associated with those objectives were necessary, including whether the information collection requests imposed by the Secretary's regulation would have "practical utility" (44 U.S.C. 3504(c), 3508).

More specifically, OMB solicited comments from interested parties and, based on the resulting record, found that the Secretary had failed to provide an adequate justification for its three modifications. See 52 Fed. Reg. 46,076 (1987) (Pet. App. 22a-44a). Although OMB disapproved the Secretary's methods in those three respects,

thus preventing their enforcement, OMB also suggested alternative methods that OMB believed would achieve the Secretary's regulatory goals. *Ibid.* In addition, OMB directed the Secretary to take action "to revise these requirements \* \* \* or collect new information that would warrant a reconsideration of our decision" (*id.* at 26a). The Secretary has subsequently solicited public comment through hearings on what modifications (if any) should be made in light of OMB's disapproval. See 53 Fed. Reg. 888 (J.A. 49-102). Clearly, completion of the supplemental rulemaking, including further OMB review, should result in a better-reasoned rule.

As previously explained, OMB's reasons for disapproving the three provisions were that multi-employer worksite provisions imposed substantial burdens without associated benefits (Pet. App. 30a-33a), that the Secretary's consumer product exemption was incongruous with CPSC's requirements as well as with EPA's related exemption under its community right-to-know regulations (*id.* at 33a-36a), and that the Secretary's drug exemption would result in substantial duplication of disclosures already required by the FDA (*id.* at 37a). By requiring the Secretary to reconsider these provisions, OMB ensured that the Secretary would either supply additional justification for the original provisions or make appropriate revisions based on the expanded rulemaking record. The court of appeals' judgment holding that the PRA review process cannot be applied in the circumstances presented by this case can result only in devaluing the governmental interest in reducing paperwork burdens created by regulatory processes. That result would not only thwart Congress's objectives and impair Executive Branch functions, but it also would needlessly increase the Judicial Branch's burdens in reviewing potentially defective rules.

**C. The Paperwork Reduction Act's Legislative History Indicates That Congress Intended To Require OMB Review In These Circumstances**

As we have explained, the PRA's express terms direct OMB to review the disapproved provisions of the Secretary of Labor's hazard communication standard. To the extent that "the statute is silent or ambiguous" (*Chevron U.S.A.*, 467 U.S. at 843), OMB's exercise of its authority "is based on a permissible construction of the statute" (*ibid.*). Thus, the Court need go no further. Nonetheless, we think it is relevant that the PRA's legislative history strongly supports OMB's obligation to review the information collection activities such as the hazard communication standard. The legislative record demonstrates, in particular, that Congress intended the PRA to cover the types of information collection activities involved here and that OMB is entitled to review the paperwork obligations imposed by an agency as a method of accomplishing the agency's "substantive" policies.

The PRA was an outgrowth of Congress's efforts to update the Federal Reports Act of 1942 and, more generally, to reduce government paperwork burdens and improve the government's use and management of information. In 1974, Congress established the Commission on Federal Paperwork "to reexamine the policies and procedures of the Federal Government which have an impact on the paperwork burden" (Act of Dec. 27, 1974, Pub. L. No. 93-556, § 1, 88 Stat. 1789). The Commission's members included the Director of OMB, who was responsible for reviewing the information collection activities of Executive Branch agencies under the Federal Reports Act (44 U.S.C. 3506, 3509 (1976)), and the Comptroller General, who was responsible for reviewing the information collection activities of independent agencies under that Act (44 U.S.C. 3512 (1976)). See § 4, 88 Stat. 1790.

In 1977, the Commission on Federal Paperwork issued a study entitled *The Reports Clearance Process* (Sept. 9, 1977) that described some of the shortcomings of the Federal Reports Act's review process. That study explained:

The Act is not clear on its coverage of a major portion of the paperwork burden—recordkeeping requirements—although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines.

*Id.* at 1. The study further noted that "[n]ot all agencies covered by the Federal Reports Act comply fully with its requirements" (*ibid.*). The study later explained:

For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws.

*Id.* at 43.<sup>18</sup>

<sup>18</sup> The Comptroller General made the same point in a 1976 report to Congress:

SEC believes that some of its activities involve collection of information subject to 44 U.S.C. 3512, but other SEC responsibilities involve the "disclosure" of information to the public rather than collection activities, and accordingly, are not subject to that provision.

Report to Congress by the Comptroller General, *Status of GAO's Responsibilities Under the Federal Reports Act*, OSP-76-14 at 15 (May

In 1979, Senator Chiles introduced legislation to amend the Federal Reports Act (S. 1411, 96th Cong., 1st Sess.), and the following year, Representative Brooks introduced similar legislation (H.R. 6410, 96th Cong., 2d Sess.). In each instance the proposed legislation gave OMB centralized authority to review information collection requests, specifically clarifying, through the definition of the terms "information collection request" and "collection of information" that government-imposed record-keeping requirements and other similar requirements would be subject to OMB review. See S. 1411, *supra* (§ 3502(5) and (6)); H.R. 6410, *supra* (§ 3502(2) and (9)). Furthermore, both bills specifically authorized OMB to review the information collection requests of independent agencies, such as the SEC, but allowed those agencies to "override" OMB's decision to disapprove specific requests. See S. 1411, *supra* (§ 3509); H.R. 6410, *supra* (§ 3507).

In subsequent hearings, OMB and the Comptroller General testified and submitted comments in favor of the legislation, specifically noting that the proposed changes would cure the previously cited deficiencies in the Federal Reports Act. See *Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 Before the Subcomm. on*

28, 1976). The Comptroller General further explained that "[t]he underlying reasons for these agencies' refusal to submit most of their forms to us for clearance are that they believe this would be an intrusion into their regulatory responsibilities" (*id.* at 16). He recommended that Congress clarify the Federal Reports Act "to allow the clearance agency to challenge the need for regulatory information" (*id.* at 20). The Comptroller General subsequently provided his report to the Senate subcommittee with responsibility for paperwork reduction legislation. See *Efforts to Reduce Federal Paperwork Burdens: Hearing Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 45, 66 (1978).

*Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 24-60, 119-125 (1979) [hereinafter *S. 1411 Hearings*]; *Paperwork Reduction Act of 1980: Hearings on H.R. 6410 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 35-60, 88-108 (1980) [hereinafter *H.R. 6410 Hearings*].

Representatives of several independent agencies, including the SEC, objected to a number of the proposed changes, contending that the legislation's definition of "collection of information" was too broad and that the legislation would substantially undermine their regulatory independence. See *S. 1411 Hearings* 61-87; *H.R. 6410 Hearings* 313-336. For example, Commissioner Evans of the SEC stated:

In our view, the definition of collection of information in the Federal Reports Act under current law is limited to collection for statistical purposes and does not authorize review of disclosure or enforcement related information gathering.

By contrast, the definition of "collection of information" in section 3502 of this bill which makes any request for information to 10 or more persons in a standard form subject to the approval provisions of the bill appears to be far more extensive. This expansion of the Federal Reports Act is of major concern to us.

\* \* \* \* \*

Moreover, the standards in section 3507<sup>19</sup> demonstrate that it should not apply to the Commission's

<sup>19</sup> Section 3507 of S. 1411 provided that OMB would determine whether "the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency and has practical utility for the agency." See *S. 1411 Hearings* 100.

requirements for disclosure to the public. These standards are based on the Government's need for information, but Commission disclosures are based on the need of the public for the information; the information does not have practical utility to the Commission, but rather to the public.

*S. 1411 Hearings* 67-68. Senator Chiles viewed the independent agencies' objections skeptically, asking the representatives of the SEC and the Federal Communication Commission (FCC) "why is it, each of your independent regulatory missions are any different from that of any executive agency regulatory mission like EPA or OSHA?" (*id.* at 84). He later added,

Well, you both make very persuasive arguments for the independence of your agencies and the sensitivity of what you are protecting.

However, I fail to see that that is more persuasive than the environmental protection of this country. I fail to see that it is more sensitive. I fail to see that there is less pressure by concerns that would be trying to stop reports of regulations in regard to environmental matters or the safety of workers at the workplace.

*S. 1411 Hearings* 85.<sup>20</sup>

<sup>20</sup> Senator Chiles later returned to the theme that the independent regulatory agencies should be subject to the same review as EPA and OSHA, stating:

We are talking about not wanting to cripple the mission of the independent regulatory agencies nor the mission of the executive agencies like EPA and OSHA and all of the other agencies that are vital to the well-being of this country. But at the same time, we are trying to put some governor on this thirst for information and some rational decisionmaking processes that Congress can

The House and Senate Committees decided to retain the broadened definitions of the terms "information collection requests" and "collection of information." The House Report on H.R. 6410 explained that "the OMB Director is to ensure that the agencies, in developing rules and regulations, use efficient methods to collect, use, and disseminate the necessary information." H.R. Rep. No. 835, 96th Cong., 2d Sess. 9 (1980). The Report noted that "recordkeeping requirements are specifically included in the reports clearance process" (*id.* at 19). The Senate Report on S. 1411 agreed. See S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). It added that the definition of the term "recordkeeping requirement" "includes information maintained by persons which may be but is not necessarily provided to a Federal agency" (*id.* at 40). The Senate Report further explained that

[T]he term "collection of information" has been clarified to eliminate the possibility that information collections be interpreted to apply only to situations where answers provided by respondents are to be used for statistical compilations of general public interest. This interpretation, which has been employed by the [SEC], will not have any foundation.

*Id.* at 13. Accord H.R. Rep. No. 835, *supra*, at 19. The Senate Report also explained:

The "collection of information" definition does not change the scope of current authority and practice by the Director of OMB and the Comptroller General to promulgate rules and regulations needed to inter-

review and that the people can hold accountable, and that we can say we are trying to get a handle on.

*S. 1411 Hearings* 87.

pret the relationship of certain kinds of information to the definition of collection of information.

S. Rep. No. 930, *supra*, at 39. The Committee Reports specifically addressed the SEC's objections at the hearings that OMB oversight of agency information collection activities would intrude on their "substantive" policies. The House Report stated:

SEC [s]trongly recommended that H.R. 6410 be amended to narrow the definition of "collection of information" to exclude reporting required in connection with statutorily-authorized regulatory, enforcement, or oversight efforts. SEC believes that the current Federal Reports Act definition is limited to collection for statistical purposes and does not authorize review of disclosure- or enforcement-related information gathering.

The Committee agrees with both FCC and SEC as to the close relationship between policymaking and information management. However, regulatory agencies in the executive branch, such as EPA, have been able to justify to OMB their need for information used to establish policy or for other purposes. The independent regulatory agencies should also be capable of doing so. \* \* \*. The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements.

H.R. Rep. No. 835, *supra*, at 23. The Senate Report also responded to the SEC's concern regarding the application of the concept of "practical utility" to public disclosure requirements:

Information is also collected to form the basis for disclosure to the public. For example, documents filed

with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

S. Rep. No. 930, *supra*, at 39-40.

The House and the Senate each passed substantially similar bills (126 Cong. Rec. 6216-6217, 30,190-30,193 (1980)), and the House later agreed to the Senate version of the bill (*id.* at 31,222-31,228) without the need for a conference report. The legislative debates and floor amendments are consistent with the statements contained in the Committee Reports. See *id.* at 6208-6214, 30,170-30,179. In 1986, Congress reauthorized the PRA. See Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, Tit. VIII, 100 Stat. 3341-335. Congress's reauthorization, if anything, reinforced the PRA's broad coverage.<sup>21</sup>

<sup>21</sup> Congress retained the definitions contained in the PRA but clarified that an "information collection request" includes a "collection of information requirement" (§ 812(1), 100 Stat. 3341-335). See S. Rep. No. 347, 99th Cong., 2d Sess. 52 (1986). The purpose of this amendment was to make clear that the PRA's requirements concerning "information collection requests" also applied to "collection of information requirements" contained in existing or proposed rules. *Ibid.*

Thus, the PRA's legislative history confirms that the statute means what it says. The PRA's broad definition of "information collection requests" was intended to reach agency regulations, developed as part of the agency's statutory mission, that require regulated entities to gather or retain information for disclosure to third parties. The disapproved provisions of the Secretary of Labor's hazard communication standard fall within the statutory definition and are subject to OMB review.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1989

\* The Solicitor General is disqualified in this case.

### ADDENDUM

#### STATUTORY AND REGULATORY PROVISIONS INVOLVED

##### A. Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (1982 & Supp. IV 1986)

##### § 3501. Purpose

The purpose of this chapter is —

- (1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;
- (2) to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;
- (3) to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government;
- (4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;

\* \* \* \* \*

##### § 3502. Definitions

As used in this chapter —

\* \* \* \* \*

(3) the term "burden" means the time, effort, or financial resources expended by persons to provide information to a Federal agency;

(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either —

(1a)

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

\* \* \* \* \*

(11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information;

\* \* \* \* \*

(16) the term "practical utility" means the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion; and

(17) the term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

\* \* \* \* \*

#### § 3504. Authority and functions of Director

(a) The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of

records, agency sharing and dissemination of information, and acquisition and use of automatic data processing, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

\* \* \* \* \*

(c) The information collection request clearance and other paperwork control functions of the Director shall include —

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

\* \* \* \* \*

(h)(1) As soon as practicable, but no later than publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Director a copy of any proposed rule which contains a collection of information requirement and upon request, information necessary to make the determination required pursuant to this section.

(2) Within sixty days after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information requirement contained in the proposed rule.

(3) When a final rule is published in the Federal Register, the agency shall explain how any collection of information requirement contained in the final rule responds

to the comments, if any, filed by the Director or the public, or explain why it rejected those comments.

(4) The Director has no authority to disapprove any collection of information requirement specifically contained in an agency rule, if he has received notice and failed to comment on the rule within sixty days of the notice of proposed rulemaking.

(5) Nothing in this section prevents the Director, in his discretion —

(A) from disapproving any information collection request which was not specifically required by an agency rule;

(B) from disapproving any collection of information requirement contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection; or

(C) from disapproving any collection of information requirement contained in a final agency rule, if the Director finds within sixty days of the publication of the final rule that the agency's response to his comments filed pursuant to paragraph (2) of this subsection was unreasonable.

(D) from disapproving any collection of information requirement where the Director determines that the agency has substantially modified in the final rule the collection of information requirement contained in the proposed rule where the agency has not given the Director the information required in paragraph (1), with respect to the modified collection of information requirement, at least sixty days before the issuance of the final rule.

(6) The Director shall make publicly available any decision to disapprove a collection of information requirement contained in an agency rule, together with the reasons for such decision.

(7) The authority of the Director under this subsection is subject to the provisions of section 3507(c).

(8) This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments.

(9) There shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule.

\* \* \* \* \*

#### § 3506. Federal agency responsibilities

(a) Each agency shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner, and for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

\* \* \* \* \*

#### § 3507. Public information collection activities — Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information —

(1) the agency has taken actions, including consultation with the Director, to —

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency (A) has submitted to the Director the proposed information collection request, copies of pertinent regulations and other related materials as the Director may specify, and an explanation of actions taken to carry out paragraph (1) of this subsection, and (B) has prepared a notice to be published in the Federal Register stating that the agency has made such submission and setting forth a title for the information collection request, a brief description of the need for the information and its proposed use, a description of the likely respondents and proposed frequency of response to the information collection request, and an estimate of the burden that will result from the information collection request; and

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions, including an explanation thereof, publicly available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension), a control number shall be assigned without further delay,

the approval may be inferred, and the agency may collect the information for not more than one year.

(c) Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years.

(d) The Director may not approve an information collection request for a period in excess of three years.

\* \* \* \* \*

#### § 3508. Determination of necessity for information; hearing

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

\* \* \* \* \*

### § 3516. Rules and regulations

The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter.

\* \* \* \* \*

### § 3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

\* \* \* \* \*

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

\* \* \* \* \*

### B. OMB Regulations Implementing the Paperwork Reduction Act (5 C.F.R. Pt. 1320)

#### PART 1320—CONTROLLING PAPERWORK BURDEN ON THE PUBLIC

##### § 1320.1 Purpose.

The purpose of this part is to implement the provisions of the Paperwork Reduction Act of 1980, as amended, (44 U.S.C. Chapter 35) (the Act) concerning collections of information. It is issued under the authority of section 3516 of the Act, which provides that "The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this Chapter." It is designed to minimize and control burdens associated with the collection of information by Federal agencies from individuals, businesses and other private institutions, and State and local governments. \* \* \*

##### § 1320.4 General requirements.

\* \* \* \* \*

(b) To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that:

(1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and

(3) The collection of information has practical utility. The agency shall also seek to minimize the cost to itself of collecting, processing, and using the information, but shall not do so by means of shifting disproportionate costs or burdens onto the public. \* \* \*

(c) OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions. In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility. In addition:

(1) OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation; and

(2) OMB will consider necessary any collection of information specifically required by an agency rule approved or not acted upon by OMB pursuant to §§ 1320.13 or 1320.14, but will independently assess any such collection of information to the extent that it deviates from the specifications of the rule.

(d) Except as provided in § 1320.20, to the extent that OMB determines that all or any portion of a collection of information by an agency is unnecessary, for any reason, the agency shall not engage in such collection or portion thereof.

\* \* \* \* \*

#### § 1320.7 Definitions.

For purposes of implementing the Paperwork Reduction Act and this Part, the following terms are defined as follows:

\* \* \* \* \*

(b) "Burden" means the total time, effort, or financial resources required to respond to a collection of information, including that to read or hear instructions; to

develop, modify, construct, or assemble any materials or equipment; to conduct tests, inspections, polls, observations, or the like necessary to obtain the information; to organize the information into the requested format; to review its accuracy and the appropriateness of its manner of presentation; and to maintain, disclose, or report the information.

\* \* \* \* \*

(c) "Collection of information" means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. In the Act, a "collection of information requirement" is a type of "information collection request." As used in this Part, a "collection of information" refers to the act of collecting information, to the information to be collected, to a plan and/or an instrument calling for the collection of information, or any of these, as appropriate.

(1) A "collection of information" includes the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods. Similar methods may include contracts, agreements, policy statements, plans, information collection requests, collection of information requirements, rules or regulations, information collection requests or collection of information requirements contained in, derived from, or authorized by such rules or regulations, planning requirements, circulars, directives, instructions, bulletins, requests for proposal or other

procurement requirements, interview guides, oral communications, disclosure requirements, labeling requirements, telegraphic or telephonic requests, automated collection techniques, and standard questionnaires used to monitor compliance with agency requirements.

(2) Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within this definition.

\* \* \* \* \*

(o) "Practical utility" means the actual, not merely the theoretical or potential, usefulness of information to an agency, taking into account its accuracy, adequacy, and reliability, and the agency's ability to process the information in a useful and timely fashion. In determining whether information will have "practical utility," OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction. In the case of general purpose statistics or recordkeeping requirements, "practical utility" means that actual uses can be demonstrated.

(p) "Recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records and includes requirements that information be maintained or retained by persons but not necessarily provided to an agency.

(q) "Reporting requirement" means a requirement imposed by an agency on persons to provide information to another person or to the agency. Reporting requirements may implicitly or explicitly include related recordkeeping requirements.

\* \* \* \* \*

#### § 1320.13 Clearance of collections of information in proposed rules.

Agencies shall submit collections of information contained in proposed rules published for public comment in the *Federal Register* in accordance with the following requirements:

(a) The agency shall include, in accordance with the requirements set forth in § 1320.15, in the preamble to the Notice of Proposed Rulemaking a statement that the collections of information contained in the rule, and identified as such, have been submitted to OMB for review under section 3504(h) of the Act. \* \* \*

(b) All such submissions shall be made to OMB not later than the day on which the Notice of Proposed Rulemaking is published in the *Federal Register*, in such form and in accordance with such procedures as the Director may direct. Such submissions shall include a copy of the proposed regulation and preamble.

(c) Within 60 days of publication of the proposed rule, OMB may file public comments on collection of information provisions. Such comments shall be in the form of an OMB Notice of Action, which shall be sent to the Senior

Official or agency head, or their designee, and which shall be made a part of the agency's rulemaking record.

(d) If an agency submission is not in compliance with paragraph (b) of this section, OMB may disapprove the collection of information in the proposed rule within 60 days of receipt of the submission. If an agency fails to submit a collection of information subject to this section, OMB may disapprove it at any time.

\* \* \* \* \*

(g) On or before the date of publication of the final rule, the agency shall submit the final rule to OMB, unless it has been approved pursuant to § 1320.13(f) (and not substantively or materially modified by the agency after approval). Not later than 60 days after publication OMB shall approve, modify, or disapprove the collection of information contained in the final rule. Any such disapproval may be based on one or more of the following reasons, as determined by OMB:

(1) The agency failed to comply with paragraph (b) of this section;

(2) The agency had substantially modified the collection of information contained in the final rule from that contained in the proposed rule, without providing OMB with notice of the change of sufficient information to make a determination concerning the modified collection of information at least 60 days before publication of the final rule; or

(3) In cases where OMB had filed public comments pursuant to paragraph (c) of this section, the agency's response to such comments was unreasonable, and the collection of information is unnecessary for the proper performance of the agency's functions.

\* \* \* \* \*

(i) OMB shall not approve any collection of information for a period longer than three years. Approval of any collection of information submitted under this Section will be for the full three-year period, unless the Director determines that there are special circumstances requiring approval for a shorter period.

\* \* \* \* \*

#### § 1320.22 Other authority.

(a) The Director shall determine whether any collection of information or other matter is within the scope of the Act, or of this Part.

(b) In appropriate cases, after consultation with the agency, the Director may initiate a rulemaking proceeding to determine whether an agency's collection of information is consistent with statutory standards. Such proceedings shall be in accordance with informal rulemaking procedures under 5 U.S.C. Chapter 5.

(c) Each agency is responsible for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

(d) To the extent permitted by law, the Director may waive any requirements contained in this Part.

(e) Nothing in this Part shall be interpreted to limit the authority of the Director under the Paperwork Reduction Act of 1980, the Paperwork Reduction Reauthorization Act of 1986, or any other law. Nothing in this Part, the Paperwork Reduction Act of 1980, or the Paperwork Reduction Reauthorization Act of 1986 shall be interpreted as increasing or decreasing the authority of OMB with respect to the substantive policies and programs of the agencies.

\* \* \* \* \*

C. The Bureau of the Budget's Superseded Regulation Implementing the Federal Reports Act (Regulation A (Feb. 13, 1943))

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

Washington, D.C.

February 13, 1943

REGULATION A

Federal Reporting Services

Clearance of Plans and Report Forms

In pursuance of the authority granted in Section 6 of the Federal Reports Act of 1942, in furtherance of the policies stated in the act, and in order especially to provide for the review and clearance of plans and report forms used by Federal agencies in the collection of information as required by Section 5, the following rules and regulations are promulgated:

*Title I—Definitions and Explanations*

1. In this Regulation—

(a) The term "act" shall mean the Federal Reports Act of 1942. Section 5 of the act reads as follows:

"No Federal agency shall conduct or sponsor the collection of information, upon identical items, from ten or more persons (other than Federal employees considered as such) unless, in advance of adoption or revision of any plans or forms to be used in such collection,

"(a) The agency shall have submitted to the Director such plans or forms, together with copies of such pertinent regulations and other related materials as the Director shall specify; and

"(b) The Director shall have stated that he does not disapprove the proposed collection of information."

(b) The term "Federal agency" shall mean any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government, *Provided*, That it does not include the government of the District of Columbia or of any territory or possession of the United States, or any subdivision thereof; the General Accounting Office; the Bureau of Internal Revenue, the Comptroller of the Currency, the Bureau of the Public Debt, the Bureau of Accounts, or the Division of Foreign Funds Control of the Treasury Department; or any Federal bank supervisory agency to the extent that such agency obtains reports and information from banks as provided or authorized by law and in the proper performance of its supervisory functions.

(c) The term "Director" shall mean the Director of the Bureau of the Budget. The term "Assistant Director" shall mean the Assistant Director of the Bureau of the Budget in charge of the Division of Statistical Standards or his designated representative.

(d) The term "report form" shall mean or include any application form or other administrative report form, questionnaire, telegraphic request, or other similar device for the collection of information.

(e) The term "plan" shall mean or include:

(1) Any general or specific requirement for the establishment or maintenance of records (including systems of accounts and systems of classification) which are to be used or be available for use in the collection of information.

(2) Any requirement or instruction affecting the content, preparation, return, or use of a plan or report form.

(f) The term "requirement" shall be deemed to include a recommendation, order, regulation, or other directive, but shall not apply to a general directive (in an order or regulation) which imposes a general duty to maintain such records or submit such reports as may thereafter or otherwise be specifically prescribed by appropriate authority. Such general directives shall, however, state that specific recording or reporting requirements subsequently prescribed will be "subject to the approval of the Bureau of the Budget pursuant to the Federal Reports Act of 1942."

(g) The term "information" shall mean facts or opinions obtained or made available by the use of a plan or report form.

(h) "Clearance" of a plan or report form shall mean and include (1) a determination that the information to be sought or provided thereby is reasonably needed by the agency concerned in the proper performance of its functions or otherwise, and (2) authorization to use the plan or report form in the collection or recording of such information in the manner proposed, or on such other conditions as the Assistant Director may prescribe, with an approval number, notation, or other appropriate device inscribed or endorsed thereon to indicate clearance, as herein prescribed. Such clearance shall constitute a declaration by the Director, in accordance with section 5 of the act, that he does not disapprove the collection of information in the manner proposed. A withholding of clearance shall constitute among other things a determination in pursuance of section 3(d) of the act that the collection of information in the manner proposed is unnecessary.

(i) The term "person" shall mean any individual, partnership, association, corporation, business trust, or legal representative, any organized group of persons, any State or territorial government or branch thereof, any political

subdivision of any State or territory or any branch of any such political subdivision.

(j) The term "respondent" shall mean any person, or any agency employee or instrumentality of the Federal Government, from whom information is obtained or requested on a plan or report form.

(k) Any plan or report form shall be deemed to be "used" by an agency when its use is wholly or partly sponsored, controlled, or contracted for by the agency.

(l) "Unnecessary duplication" shall be deemed to exist in the collection of information if the duplicating activities involve either identical information or information adequately similar for satisfactory use.

#### *Title II - Clearance Requirements*

2. (a) *General.* No plan or report form (as herein limited or described) shall be used or prescribed by a Federal agency in the collection or recording of information without first obtaining clearance thereof from the Assistant Director and inscribing or endorsing thereon, to indicate such clearance, an approval number, notation, or other appropriate device, as herein prescribed. The provisions of this title shall apply only to (1) plans and report forms which require or call for information of an identical nature (or the recording thereof) from ten or more persons other than Federal employees considered as such, and (2) report forms which call for information of an identical nature from agencies, employees, or instrumentalities of the Federal Government, which is to be used for statistical compilations of general public interest, including compilations showing the status or implementation of Federal activities and programs.

(b) *Report Forms.* Clearance of a report form shall be evidenced or indicated by printing or inscribing on each

copy so used, in the upper right-hand corner of the first page, an approval number assigned to it by the Assistant Director, in the following manner:

- (1) When no time limit is assigned to the use of the report form, the following style shall be employed:

Form Approved  
Budget Bureau No. 00-R000

- (2) When a time limit is assigned to the use of the report form, the date of expiration shall be shown as follows:

Budget Bureau No. 00-R000  
Approval Expires (date)

No report form shall be used after its expiration date without resubmission and further clearance prior thereto.

(c) *Plans.* Clearance of plans for use in the collection or recording of information shall be evidenced by printing or inscribing on each plan so used the following endorsement or such other device as may be required by the Assistant Director:

This . . . (regulation, order, instruction, or other requirement) . . . has been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(d) *Termination of Clearance and Use.* Upon notice by the Assistant Director, authority or permission to use any approval number or other device signifying clearance shall terminate and use thereof shall be discontinued, notwithstanding any time limit or expiration date previously fixed.

3. (a) *Submittal for Clearance.* In order to obtain review and clearance of a plan or report form, two copies thereof shall be submitted to the Assistant Director in time to allow for adequate review and the adoption of any necessary alterations (including coordination or integration with other plans and report forms) without delaying

the operating program to which the plan or report form relates. Such submittal shall be accompanied by a copy of Form DSS 37, and shall include the following statements and such other information as the Assistant Director shall require:

- (1) A brief statement of justification for the plan or report form in terms of its relation to a specified operating program, research function, or other Federal or non-Federal activity.

- (2) A statement of any provisions or arrangements, whether prescribed by law or otherwise operative, which make the information confidential or otherwise limit its use by any other persons or organizations.

- (3) Whenever it is the intention to employ the plan or report form with regard to an entire class of respondents, a statement justifying such procedure and explaining why it would not be satisfactory and feasible to use an abridged version thereof for particular segments of the class (such as small business enterprises) or to collect or process such information from a segment or sample of the class.

- (4) A statement or other assurance satisfactory to the Assistant Director that the material submitted has been reviewed by each unit (in the same department or independent establishment) which may have an interest therein or may have already collected or otherwise dealt with the same or similar information, or may have need therefor, and that there is no unnecessary duplication within the department or independent establishment.

(b) *Other Material.* In addition to the foregoing, there shall be submitted for examination or clearance such other material pertaining to the collection, processing, tabula-

tion, analysis, or publication of information as may from time to time be required by the Assistant Director.

(c) *Practical Utility.* To minimize the reporting burden on respondents, especially individuals and small business enterprises, and to improve governmental efficiency, each Federal agency shall consider and determine, in connection with each plan or report form submitted, whether the proposed plan or report form exceeds the limits of reasonable need or practical utility, either with respect to number of respondents, frequency of collection, number and difficulty of the items, or otherwise, and whether all of the items of information to be furnished or recorded are essential to the central purpose of such plan or report form. Clearance of plans and report forms submitted will be withheld whenever it appears to the Assistant Director that this requirement has not been met.

4. *Revision.* Before a material revision or change shall be made in a plan or report form for which clearance is required, or in the use thereof, further clearance shall be obtained from the Budget Bureau in the manner prescribed in this regulation, by submitting pertinent data or explanation in relation thereto on Form DSS 37 or otherwise. A material revision or change in a plan or report form or the use thereof, necessitating further clearance, shall mean or include any significant revision in (a) the kind or amount of information sought, (b) the number and identity of respondents, and (c) the time or frequency of reporting. It shall also include a transfer of the duty or function of collecting, processing, or tabulating the information, either into, or out of, or within a Federal agency.

### **Title III - Use of Exempt Forms**

5. (a) *Granting of Exemptions.* Exemptions from clearance may be granted by the Assistant Director with

respect to affidavits, oaths, certifications, and other plans and report forms which do not call for information of substantial volume or importance.

(b) *Advisory Review.* Any plan or report form that is outside the purview of this regulation, or any other form or reporting requirement, may be submitted to the Assistant Director for advisory review and, when desired, assignment of an approval number or other clearance device, pursuant to section 2(a), in order to facilitate the use thereof.

(c) *Notation on Exempt Forms.* In order otherwise to facilitate compliance with forms and reporting requirements for which clearance is not required by this regulation and has not been obtained in pursuance of the preceding paragraph, or with respect to which exemption may have been granted by the Assistant Director, and otherwise to minimize uncertainty and misunderstanding in connection with the use thereof, the following notation may be used thereon by the agency concerned, preferably in the upper right-hand corner of the first page:

Approval of Budget Bureau  
not required.

The foregoing includes:

(1) Plans and report forms used by Federal agencies that are not subject to the act or this regulation, and those which are used in the collection (or recording) of information from less than ten persons or in other circumstances not covered by section 2(a).

(2) Forms and reporting requirements other than those herein defined as a plan or report form.

(d) *Termination of Exemption.* The use of the foregoing notation shall be discontinued, and an approval number or other appropriate clearance device shall be required in its place, whenever it shall be determined by the

Assistant Director (in the absence of an authoritative ruling to the contrary) that the plan, report form, or other request for data is within the purview of section 2(a) of this regulation.

#### *Title IV - Miscellaneous*

6. *Deviation from Terms of Clearance.* No deviation shall be made in the use of any plan or report form, or any clearance device, from the terms and conditions on which clearance shall have been granted hereunder.

7. *Notice of Discontinuance.* Whenever the use of a plan or report form to which an approval number has been assigned is discontinued, except by expiration of a time limit fixed in pursuance of section 2(b), the Assistant Director shall be notified by the responsible agency.

8. *Records and Reports.* Each Federal agency shall afford the Assistant Director access to its records concerning the status and use of each plan and report form, and shall make such improvements in the records and such reports therefrom as the Assistant Director shall prescribe.

9. *Waivers and Other Determinations by Bureau.* Any provision of this regulation may be waived in writing by the Assistant Director, and the determination of the Assistant Director as to whether any plan, report form, activity, or other matter is within the scope of the act or this regulation shall be controlling.

10. *Delegation of Director's Authority.* The authority conferred by the act on the Director may be exercised by the Assistant Director to the extent necessary or appropriate for the performance of any function or duty prescribed by this regulation.

11. *General Authority.* This regulation shall not be deemed to limit or preclude exercise of the authority vested in the Bureau by Executive Order 8248, or other-

wise, to plan and promote the improvement, development, and coordination of Federal and other statistical services.

12. *Revocations.* Budget Circular No. 77 and Budget Circular No. 337 are hereby superseded, insofar as they govern the collection, processing, analysis, and publication of information as herein defined. The following are revoked: Budget Circular 351; Budget Circular 360 and Supplement No. 1 thereto; and subsections 4(b) to 4(f), inclusive, of Budget Circular 379.

13. *Forms Already in Use.* With respect to report forms which, having been previously cleared by the Bureau of the Budget, are in use on the effective date of this regulation in conformity with Budget Circular 360 and Supplement No. 1 thereto, such previous clearance shall be deemed to satisfy the requirements of section 2(a) and to constitute clearance under this regulation, subject to the provisions hereof and to such further action as may be required or taken by the Assistant Director hereunder. Plans in use on the effective date of this regulation, whether or not previously cleared under Budget Circular 360 and Supplement No. 1 thereto, shall be deemed to have been granted clearance for the purposes of title II of this regulation, subject to termination of clearance as herein provided.

14. *Effective Date.* This regulation shall be effective February 15, 1943.

HAROLD D. SMITH  
Director

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UNITED STATES DISTRICT COURT  
District of Columbia  
Southern District  
Summer Term, 1968

ELIZABETH DOLA, SECRETARY OF LABOR, et al.,  
*Petitioners*

v.

UNITED STEELWORKERS OF AMERICA, et al.,  
*Respondents*

Office of Clerkship to the  
United States Court of Appeals  
for the Third Circuit

UNITED STATES ASSOCIATED BUILDERS  
AND TRADERS, INC. AND THE  
NATIONAL TRADE ASSOCIATIONS

Case No. 100-10000  
United States District Court  
District of Columbia  
Southern District  
Washington, D.C. 20004  
(202) 555-4000

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Date: June 25, 1968

UNITED STATES DISTRICT COURT, S.D. - 725-0000 - WASHINGTON, D.C. 20001

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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No. 88-1434

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ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners*  
v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents*

---

On Writ of Certiorari to the  
United States Court of Appeals  
- for the Third Circuit

---

BRIEF OF RESPONDENTS ASSOCIATED BUILDERS  
AND CONTRACTORS, INC. AND THE  
CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS

---

STATEMENT OF THE CASE

Respondents Associated Builders and Contractors, Inc. (ABC) and the Construction Industry Trade Associations (CITA) submit this brief on the merits in support of the position of the Petitioners, the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health.<sup>1</sup> Because ABC and CITA

---

<sup>1</sup> Respondent CITA consists of a coalition of the following construction industry trade association representing over 200,000 member employers: The National Association of Home Builders, American Subcontractors Association, Amer-

generally support the Petitioners' position, this brief is being submitted on the date due for filing of the Petitioners' brief on the merits pursuant to Supreme Court Rule 19.6. Respondents ABC and CITA hereby adopt the Statement of the Case set forth in Petitioners' brief, except to add certain facts necessary for an understanding of Respondents' role and interest in this case.

Respondents ABC and CITA both intervened below in opposition to the Motion for Further Relief filed by the United Steelworkers of America, which was ruled upon by the Court of Appeals in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988), rehearing denied (Nov. 28, 1988); Pet. App. 1a. Together with the present governmental Petitioners, ABC and CITA argued that the Court of Appeals lacked authority to review OMB's disapproval of portions of the revised Hazard Communication Standard. ABC and CITA also argued to the court below that the plain language of the Paperwork Reduction Act as well as that statute's legislative history authorized OMB to disapprove the information collection requirements at issue in the case and that the court should not interfere with

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ican Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall & Ceiling Industries-International, Insulation Contractors Association of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheetmetal and Air Conditioning Contractors National Association.

OMB's lawful disapproval of OSHA's burdensome and unnecessary requirements.

Following the Court of Appeals' adverse decision, in which it invalidated OMB's disapproval of the revised HCS, ABC and CITA filed their own Petition for Writ of Certiorari with this Court. *Associated Builders and Contractors, Inc. v. OSHA*, Docket No. 88-1075. That petition remains pending before the Court and raises the identical issue presented in the government's petition now under review. The ABC petition further challenges the Court of Appeals' decision in the related case of *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988), in which the Court of Appeals upheld the revised Hazard Communication Standard in its entirety.

As is further discussed below, the employer members of ABC and CITA are directly and adversely affected by the burdensome paperwork requirements of the revised Hazard Communication Standard which OMB properly disapproved. That disapproval should be reinstated, and the Court of Appeals' order should be reversed, in order to fulfill the mandate of the Paperwork Reduction Act and avoid imposing unnecessary paperwork burdens on construction industry employers.

The construction industry is most concerned about the paperwork burdens created by two of the three disapproved provisions. These are: (1) OSHA's requirement that Material Safety Data Sheets (MSDSs) be compiled and maintained at multi-employer worksites for exchange among myriad, often unidentifiable employers; and (2) OSHA's failure to exempt from the HCS all consumer products which are excluded from the definition of "hazardous chem-

icals" under the Superfund Amendment and Reauthorization Act of 1986.

As noted by OMB in its disapproval of the multi-employer worksite MSDS requirements, the revised HCS requires large numbers of MSDSs to be compiled and maintained by employers at all multi-employer worksites so that the MSDSs can be made available or exchanged with other employers at the site.<sup>2</sup> OMB received evidence and properly found that MSDSs were of "little, if any, practical utility" in such situations because "neither employers nor employees can predict what, where or when exposures are likely to occur or consult the MSDS before deciding how to handle the substance." Pet. App. 30a.

OMB also found reason to question OSHA's estimates of the number of MSDSs which would be required under the multi-employer worksite provision. OMB received evidence, not considered by OSHA, that the number of MSDSs required at construction indus-

<sup>2</sup> The actual disapproved provision on multi-employer worksites in the revised HCS reads as follows:

(2) Multi-employer workplaces. Employers who produce, use or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example employees of a construction contractor working on-site) shall additionally ensure the hazard communication programs developed and implemented under this paragraph (e) include the following: (i) The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s) employees may be exposed to while working.

\* \* \* \*

Jt. App. 21-22.

try sites would be a "minimum of several file cabinets" and might be "physically impossible." Pet. App. 32a.<sup>3</sup>

Accordingly, OMB disapproved "the requirement to bring MSDSs onto multi-employer worksites." Pet. App. 32a.<sup>4</sup> OMB left intact OSHA's labeling and training requirements and further upheld OSHA's requirement that employers "inform other employers of any precautionary measures that need to be taken to protect employees. . . ." Pet. App. 33a. Beyond these provisions, however, OMB found that OSHA had made no showing that the additional paperwork involved in the multi-employer MSDS provision would serve any safety-related objective.

With regard to the revised HCS's coverage of consumer products, OMB found that the standard would require employees to maintain records on "large numbers of consumer products for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." Pet. App. 33a.<sup>5</sup> OMB found that existing labeling already required on consumer products would identify any hazards re-

<sup>3</sup> OSHA did not receive this evidence because it issued the revised HCS, containing the new multi-employer worksite requirements, without first allowing any comments on this significant provision. See *Petition for Writ of Certiorari in ABC v. OSHA*, 88-1075 (cert. pending).

<sup>4</sup> Thus, contrary to the finding of the court below, the multi-employer worksite provision disapproved by OMB was not a mere "exchange" requirement which, according to the court, compelled employers "not to compile, but simply to transmit information." Pet. App. 9a-10a.

<sup>5</sup> Again, the Court of Appeals mischaracterized the provision being disapproved by OMB, incorrectly referring to the consumer product provision as a "labeling exemption." Pet. App. 9a.

quired and found no evidence that MSDSs would "have practical utility beyond the information already on the label." *Id.*

OMB also noted the excessive burden imposed by OSHA on employers to demonstrate that workplace exposures from consumer products are the same as "normal consumer use," in order to meet the criteria for exemption. OMB found that needless MSDSs would be received by employers from upstream suppliers who could not tell how their consumer products would ultimately be used. Finally, OMB heard evidence that the number of MSDSs involved would far exceed OSHA's estimates. Pet. App. 35a.

Accordingly, OMB disapproved OSHA's requirement that MSDSs be compiled and maintained on any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986. Pet. App. 35a.<sup>6</sup> The effect of this disapproval was to make the revised HCS consistent with other statutory treatments of consumer products and to allow employers to better focus their paperwork and hazard communication efforts on substances which represent *genuine* hazards in the workplace.<sup>7</sup>

<sup>6</sup> SARA exempts "any substance to the extent that it is used for personal, family, or household purposes, or is present [in the workplace] in the same form and concentration as a product packaged for distribution and use by the general public." 42 U.S.C. § 11021 (e) (3).

<sup>7</sup> In their Opposition to the Petition for Writ of Certiorari, at 7-9, the Steelworkers have sought to challenge the merits of OMB's disapproval order by relying on a subsequent Notice of Proposed Rulemaking issued by OSHA. This Notice is not properly part of the record in this case and was not considered by the court below. In any event, OSHA merely used

## SUMMARY OF ARGUMENT

The Court should reverse the judgment of the court below in order to give effect to OMB's statutory authority to reduce federal paperwork burdens. Pursuant to the Paperwork Reduction Act, Congress clearly delegated paramount responsibility for paperwork oversight and control to OMB. OMB properly exercised its authority in the present case by disapproving three burdensome and unnecessary record-keeping requirements contained in OSHA's revised Hazard Communication Standard. OMB reasonably concluded, on the basis of the evidence it received, that the three disapproved provisions had "little, if any, practical utility" and were not "the least burdensome necessary" to achieve OSHA's announced regulatory objectives.

At the outset, the Court should find that the Court of Appeals lacked jurisdiction to review OMB's disapproval of OSHA's information collection requirements in the context of the Steelworkers' Motion for Further Relief. OMB's disapproval pertained to entirely new regulations which had never previously been before the court. The Steelworkers should have been required to pursue their challenge to OMB's disapproval in a separate proceeding in U.S. district court.

the Notice to solicit comments on the OMB disapproval, along with other aspects of the HCS, and did not "reject" OMB's conclusions, contrary to the Steelworkers' contention. Opp. at 7. Also, many of the comments subsequently received by OSHA provided compelling additional support for OMB's disapproval. See, e.g., Comments of the Construction Industry Hazard Communication Coalition, OSHA Docket No. H-022D, Oct. 28, 1988.

The court below committed further error by misconstruing the statutory coverage of the PRA, which clearly authorizes OMB to review and disapprove "reporting or recordkeeping requirements, collection of information requirements, or other similar methods calling for the collection of information." The statutory definition, as confirmed by explicit legislative history, clearly applies to information collected for disclosure to the public, including the MSDSs required to be compiled and maintained by the revised Hazard Communication Standard. The court also misconstrued the terms of OMB's disapproval order, and incorrectly referred to the disapproved provisions as mere "labeling exemptions" and "transmittal requirements."

Finally, contrary to the holding of the Court of Appeals, Congress clearly recognized the supremacy of OMB over other federal agencies with regard to all paperwork requirements. The court's attempt to establish a broad "substantive rulemaking" exception to the Paperwork Reduction Act would substantially curtail OMB's authority and run contrary to Congressional intent. In any event, nothing in OMB's disapproval order has interfered with the "substantive policies and programs" of OSHA with regard to hazard communication. OMB has properly carried out its statutory mandate to "determine whether the collection of information by any agency is necessary for the proper performance of the functions of the agency." Therefore, the decision of the court below should be reversed and OMB's disapproval of selected provisions of the revised Hazard Communication Standard should be given effect.

## ARGUMENT

### I. OMB, WHICH HAS BEEN GIVEN BROAD PAPERWORK REDUCTION AUTHORITY BY CONGRESS, ACTED PROPERLY IN DISAPPROVING PORTIONS OF OSHA'S REVISED HCS.

At issue in this case is whether the Congressional objective of reducing the burden of federally mandated recordkeeping and reporting requirements will be permitted to become a reality. That goal can only be achieved by upholding the statutory authority of OMB to review and disapprove burdensome and unnecessary paperwork requirements imposed by federal agencies. Contrary to the holdings of the court below, both the plain language of the Paperwork Reduction Act and the expressed intent of Congress fully support OMB's exercise of its authority in the present case. Absent reversal by this court, OMB's authority to control the Federal paperwork burden will be eviscerated, and the burdensome and unnecessary recordkeeping required under the revised Hazard Communication Standard will unlawfully remain in effect.

Under the Paperwork Reduction Act, the Director of OMB has been charged with the responsibility of ensuring that rules and regulations are developed by other federal agencies in a manner which will, to the extent practicable and appropriate, minimize the information collection burden on the private sector. See 44 USC § 3504. Indeed, one of the most significant departures from the prior Federal Reports Act embodied in the PRA was the centralization of paperwork reduction authority in OMB. The need for this centralized approach was established by the report of the Commission on Federal Paperwork in 1977. This report estimated that federal paperwork require-

ments imposed annual costs of \$25-\$35 billion on private industry and \$8.7 billion on individuals. See *Final Summary Report of the Commission on Federal Paperwork 5* (1977).

For this reason, Congress in the PRA ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request. . . ." 44 U.S.C. § 3507(a). Congress further directed that OMB's function of clearing information collection requests should include a determination as to whether a request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility. . . ." 44 U.S.C. § 3504(c)(2). Thus, contrary to the entire thrust of the decision of the court below, OMB has been given broad authority to carry out the objectives of the Paperwork Reduction Act, and the agency is entitled to due deference on paperwork reduction issues, both from other federal agencies and the courts.

OMB's appropriate role in reducing the federal paperwork burden is well exemplified by its actions in the present case, in which it quite properly disapproved three burdensome and unnecessary recordkeeping requirements of the revised Hazard Communication Standard. Without delaying implementation of the final rule or otherwise interfering with the regulatory schedule imposed by the Court of Appeals, OMB conducted hearings and received evidence from both OSHA and affected parties. On the basis of this record, OMB reasonably concluded that the three disapproved provisions had "little, if any, practical utility" and did not appear to be "the

least burdensome necessary." See Pet. App. 24a-25a. Under these circumstances, OMB was completely justified in disapproving the three provisions of the revised Hazard Communication Standard relating to centralized maintenance of MSDSs on multi-employer worksites, overly broad coverage of consumer products, and overly broad coverage of regulated drugs.

As it further discussed below, the Court of Appeals improperly reached out to address the PRA issue, which was not properly before it. The court then decided the issue improperly by misconstruing the plain language of OMB's statutory authorization, by misstating the terms of OMB's order, and by seeking improperly to render OMB subservient to the agencies whose recordkeeping requirements Congress intended OMB to control. For each of these reasons, the order of the court below should be set aside so that OMB's disapproval of the three provisions of the revised HCS will be reinstated.

## II. THE COURT OF APPEALS LACKED AUTHORITY TO REVIEW OMB'S ORDER IN THE CONTEXT OF THE USWA'S MOTION FOR FURTHER RELIEF.

At the outset, the order of the court below should be reversed because the court lacked jurisdiction to review OMB's disapproval of OSHA's information collection requests. As noted in the government's Petition, at 20, the sole basis for the Court of Appeals' exercise of jurisdiction in this case was to determine whether the Secretary of Labor had complied with the court's previous order requiring the Secretary to extend its Hazard Communication Standard from the manufacturing sector to the non-

manufacturing sector. *United Steelworkers of America v. Pendergrass (USWA II)*, 819 F.2d 1263 (3d Cir. 1987). The court's previous order had said nothing at all about OSHA's compliance with the Paperwork Reduction Act, and this issue had never been placed before it. The court's previous order certainly did not prohibit PRA review and in fact, the initial manufacturing-sector Hazard Communication Standard *had* been submitted to OMB.

The provisions of the revised standard which OMB ultimately disapproved were entirely new. They had not been part of the courts' previous order requiring expansion of the Hazard Communication Standard to non-manufacturing industries. Accordingly, there was no basis for the court to reach the question of whether OMB's disapproval of these new provisions was proper under the Paperwork Reduction Act.

Perhaps more fundamentally, it is clear that direct review of an OMB disapproval of agency information collection requests under the PRA lies in a U.S. district court, not a court of appeals. 28 U.S.C. § 1331; 5 U.S.C. § 702. *See Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *petition for cert. pending*, No. 88-849. *See also Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1445 (D.C. Cir. 1985), *citing Bell v. New Jersey*, 461 U.S. 773, 778, n.3 (1983). As these cases make clear, neither the PRA nor the Administrative Procedure Act authorizes direct review of OMB's actions in the courts of appeals. *See also*, K. Davis, 4 *Administrative Law Treatise* 130 (2d Ed. 1983).

The Court of Appeals' reliance on the All-Writs Act, 28 U.S.C. § 1651, is misplaced. That statute

cannot be used to expand an appellate court's jurisdiction. As this Court held in *Pennsylvania Bureau of Correction v. United Marshals Service*, 474 U.S. 34, 43 (1985).

The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

*See also General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). It is also well settled that relief under the All-Writs Act is not available unless the applicant has shown that he has no other adequate remedy. *See In re Chicago, R.I. & P. Ry.*, 255 U.S. 273 (1921); *In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982).

Here, when the Steelworkers sought to challenge OMB's disapproval of OSHA paperwork requirements, the union raised issues which had never before been considered by the appellate court and were beyond its jurisdiction. Moreover, an existing statutory framework existed by which the Steelworkers could have obtained review of the OMB order in a U.S. district court under 28 U.S.C. § 1331 and the APA. Accordingly, the Court of Appeals should have directed the Steelworkers to pursue their claims in a separate proceeding in U.S. district court. The court had no authority to overturn OMB's disapproval under the guise of effectuating the court's own prior orders, which had been based upon entirely separate

legal issues. *See also Freeport Minerals Company v. United States*, 758 F.2d 629, 636 (Fed. Cir. 1985), finding no judicial authority "to assume control over an agency case, once that case has come to it for judicial review, and retain control over it regardless of the statutes which the agency must follow."

### III. THE DISAPPROVED PROVISIONS OF THE REVISED HCS CLEARLY CONSTITUTE "COLLECTION OF INFORMATION" AND "INFORMATION COLLECTION" REQUIREMENTS WITHIN THE MEANING OF THE PRA, THEREBY AUTHORIZING OMB REVIEW.

The PRA directs OMB to review and approve or disapprove all federal "information collection requests", a term which is defined as including any "written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement or other similar method calling for the collection of information." 44 U.S.C. § 3502 (11) (emphasis added). The Act further defines the "collection of information" to include the obtaining or soliciting of facts or opinions by an agency through the use of . . . *reporting or recordkeeping requirements or other similar methods.*" 44 U.S.C. § 3502(4) (emphasis added). Finally, the term "recordkeeping requirement" is defined in the Act as "a requirement imposed by an agency on persons to *maintain specified records.*" 44 U.S.C. § 3502(17) (emphasis added).

Nothing in the PRA restricts the Act's coverage to "paperwork required by the federal government for its own regulatory or statistical purposes," as contended by the court below. Pet. App. 10a. Rather, the legislative history explicitly refers to information collected for disclosure to the public in addition to information submitted to the government. Thus, in

response to statements by the Securities and Exchange Commission that the Act's definition should be limited to "collection for statistical purposes" as opposed to "review of disclosure of enforcement-related information gathering," the House Report on the PRA stated:

The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements.

H.R. Rep. No. 835, 96th Cong., 2nd Sess., 23 (1980).

The Senate report reaffirmed this legislative intent as follows:

Information is also collected to form the basis for disclosure to the public. \* \* \* In this connection, federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction."

S. Rep. No. 930 96th Cong., 2nd Sess. 39-40 (1980). So that this point could not possibly be misunderstood, the Senate Report further stated that the definition of "recordkeeping requirement" included "information maintained by persons which *may be but is not necessarily provided to a Federal agency.*" *Id.* at 40 (emphasis added).

Consistent with this legislative intent, OMB has issued regulations which interpret the Act as applying to any agency demand that persons "obtain, maintain, retain, report or publicly disclose information". 5 C.F.R. § 1320.7(c). OMB has also long held that a reporting requirement can include an agency demand that a person "provide information to another person". 5 C.F.R. § 1320.7(s). Similarly, OMB's regulations state that a recordkeeping requirement can include a requirement "that information be maintained or retained by persons but not necessarily provided to the agency." 5 C.F.R. 1320.7(r). All of these regulations were ignored by the court below, and the court thereby committed further clear error by failing to give deference to OMB's interpretation of its own governing statute. See *K-Mart Corp. v. Cartier, Inc.*, 56 U.S.L.W. 4478 (1988); *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-843 (1984).

As noted by Petitioners, the only other Court to review the statutory term "collection of information" reached a result opposite to that of the Third Circuit. In *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, the District of Columbia Circuit stated: "OMB . . . ha[s] interpreted the statutory term 'collection of information' for nearly half a century to encompass 'any general or specific requirement for the establishment or maintenance of records . . . which are to be used or be available for use in the collection of information.'"

In light of this statutory language, the expressed congressional intent, and the longstanding interpretation of the responsible agency, it was clearly erroneous for the court below to hold that the provisions of the HCS at issue here were not subject

to OMB under the PRA. Therefore, the court's holding must be set aside.

The court's conclusion was further undermined by its apparent misunderstanding of the actual HCS provisions which OMB disapproved. Thus, with regard to the revised Standard's coverage of consumer products and regulated drugs, the court below mischaracterized the disapproved provisions as mere "labeling" exemptions. Pet. App. 91. As noted above, the actual issue presented to OMB was OSHA's failure to fully exempt consumer products from the *full coverage* of the non-manufacturing HCS, most notably, from the paperwork requirements connected with MSDSs. As OMB held, it is the presence of statutorily mandated labels on consumer products which in part renders MSDSs unnecessary. Clearly, OSHA's failure to relieve non-manufacturing employers of the duty to compile and maintain MSDSs on vast numbers of consumer products constituted a "recordkeeping requirement" within OMB's review authority under the plain language of the Act.

The court below also mischaracterized the disapproved multi-employer worksite provision. The court claimed that OSHA had merely required the "transmittal" of information, Pet. App. 9a, when in fact what OMB disapproved was OSHA's requirement that MSDSs be "brought onto" multi-employer jobsites. Pet. App. 32a. The physical act of compiling and maintaining large quantities of MSDS paperwork at multiple job sites in the construction industry, regardless of who originally prepares the forms, clearly constitutes a "recordkeeping requirement" within the meaning of the Act.

Of course, even a "transmittal" of information is covered by the PRA when, in order to transmit the

information, records must first be compiled and maintained. That is clearly the case here. Therefore, the court's erroneous reading of the multi-employer work-site provision must be set aside and OMB's disapproval of this provision should be reinstated.

**IV. THE COURT OF APPEALS ERRONEOUSLY HELD THAT OMB'S DISAPPROVAL OF THE REVISED HCS CONSTITUTED UNLAWFUL INTERFERENCE WITH OSHA'S "SUBSTANTIVE RULEMAKING AUTHORITY."**

The court below committed further error by contending that its invalidation of OMB's order was "reinforced" by statutory language in the PRA which supposedly "disaffirms the intention to grant substantive lawmaking authority to OMB." Pet. App. 11a. The court's citations to sections 3504(a) and 3518(e) of the Act improperly removed those provisions from their statutory context. These provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has the responsibility to review whether the agency has chosen the least burdensome information collection methods to achieve those objectives. The court below ignored § 3518(a) of the Act which states that "the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for federal information activities *is subject to the authority conferred on the director by this chapter.*" (emphasis added).

The Court of Appeals' misreading of Congress's intent on this issue is perhaps best exemplified by the court's statement that "OMB cannot in the guise of reducing paperwork substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling

drug package inserts, proxy statement disclosures, or the contents of registration statements." Pet. App. 11a. To the contrary, as discussed at the outset of this brief, Congress deliberately empowered OMB to "substitute its judgment" for that of any agency with regard to the imposition of *paperwork burdens* on private businesses or individuals. 44 U.S.C. § 3504, 3507. Clearly, as to paperwork reduction matters only, OMB's authority was intended to supersede that of OSHA or other regulatory agencies.

The court's attempts to carve out a broad "substantive rulemaking" exception to the PRA would drastically reduce OMB's authority and render it unable to control the flow of paperwork requirements emanating from the various federal agencies. This is clearly evidenced by the examples, cited without authority by the court below, in which the court would deny OMB the authority to reduce the paperwork burden on the private sector. The court's erroneous assertion that OMB should be foreclosed from reviewing proxy statement disclosure requirements is particularly egregious in view of the explicit statements in favor of such review by both Congressional committees referred to above.

In any event, nothing in OMB's disapproval order has interfered with the "substantive policies and programs" of OSHA with regard to Hazard Communication. OSHA has never made any showing that requiring employers to maintain and/or exchange MSDSs at multi-employer worksites, as opposed to providing access to such information upon request, is necessary to increase worker safety in any way. Nor has OSHA made such a showing in connection with its proposed coverage of consumer products, which are already extensively regulated both in and out of the workplace.

OMB's review of the revised HCS was properly directed to whether OSHA's recordkeeping requirements would have practical utility. OMB did not mandate any particular method by which OSHA would be required to achieve its announced regulatory objective. OMB permitted OSHA an opportunity for additional rulemaking to provide further evidence as to why OSHA's preferred provisions were necessary. Thus, OMB has not usurped OSHA's substantive policymaking function in any way, but has simply carried out its own statutory mandate to "determine whether the collection of information by any agency is necessary for the proper performance of the functions of the agency. . . ." 44 U.S.C. § 3504 (c) (2). OMB's exercise of its statutory authority should be upheld and the Court of Appeals' decision should be set aside.

### CONCLUSION

For the reasons set forth above and in the government's Petition, the decision of the court below should be reversed and OMB's disapproval of the provisions of the revised Hazard Communication Standard should be given effect.

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## QUESTIONS PRESENTED

1. Does the Paperwork Reduction Act, in authorizing the Office of Management and Budget to review Federal Agency "information collection requests", empower the Office to review substantive regulations requiring one private party to provide information to another private party for the latter's use and protection?

2. Did the Office of Management and Budget, in countermanding regulations issued by the Occupational Safety and Health Administration requiring employers to provide employees with information concerning chemical hazards in the workplace, exceed its statutory authority under the Paperwork Reduction Act, which requires the Office to exercise its authority "consistent with applicable law," and which states that the Act shall not be interpreted as increasing the Office's authority with respect to the "substantive policies and programs" entrusted to other agencies?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 88-1434

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ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit

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BRIEF OF RESPONDENTS UNITED STEELWORKERS  
OF AMERICA, AFL-CIO, CLC, BUILDING AND  
CONSTRUCTION TRADES DEPARTMENT, AFL-CIO,  
AND PUBLIC CITIZEN

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**STATUTES INVOLVED**

In addition to the sections of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, that are reproduced in the Addendum to the Brief for the Petitioners, this case involves the following additional sections of that Act:

Section 3501 (6) :

The purpose of this chapter is:

• • • •

(6) to ensure that the collection, maintenance, use and dissemination of information by the

Federal Government is consistent with applicable laws relating to confidentiality, including section 552a of title 5, United States Code, known as the Privacy Act.

**Section 3507(f) :**

An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request.

**Section 3512:**

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

The case also involves the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, and particularly §§ 6(b)(5) & 6(b)(7), 29 U.S.C. § 655(b)(5) & (7). Those sections provide in pertinent part as follows:

**Section 6(b)(5) :**

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data

in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

**Section 6(b)(7) :**

Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

\* \* \*

The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

## STATEMENT

### A. History and Provisions of the Hazard Communication Standard

In November 1983 the Occupational Safety and Health Administration ("OSHA" or "the Agency") promulgated a Hazard Communication Standard ("the Standard" or "HCS"). The Standard is based on OSHA's determination that one of the prime causes of occupational illness and injury is that employees lack knowledge regarding the chemical hazards they confront on the job. *See* 48 Fed. Reg. 53282-84, 53321 (1983); 52 Fed. Reg. 31852, 31868-69 (1987).

The 1983 Standard requires chemical manufacturers to evaluate chemicals they produce to determine if the chemicals are hazardous. 29 C.F.R. § 1910.1200(d)(1) (App. 18).<sup>1</sup> For each chemical determined to be hazardous, the chemical manufacturer must develop a material safety data sheet ("MSDS") and provide the MSDS to employers who use the chemical in their business, § 1910.1200(g)(1)(6) (App. 24, 27); and containers of hazardous chemicals must be labeled by the manufacturer with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1) (App. 22).<sup>2</sup>

With respect to so-called "downstream" employers—viz., employers other than chemical manufacturers—the standard imposes much less extensive obligations. Those employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers. Thus, these employers must (i) maintain copies of the MSDSs they receive, and make the MSDSs accessible to employees at the worksite, § 1910.1200(g)(8) (App. 28); (ii) see to it that containers of hazardous chemicals in the workplace are labeled with information corresponding to that provided

<sup>1</sup> Some of the requirements applicable to chemical manufacturers also apply to chemical importers and distributors. For simplicity we refer to all such entities as "chemical manufacturers."

<sup>2</sup> A material safety data sheet must disclose the identity of the hazardous chemical; important physical and chemical characteristics such as vapor pressure or flash point; the physical hazards of the chemical, including the potential for fire, explosion, and reactivity; the health hazards, including signs and symptoms of exposure, and any medical conditions that are aggravated by exposure; the primary route(s) of entry into the body; applicable exposure limits; whether the chemical is listed on certain published indices of carcinogens and potential carcinogens; any generally applicable precautions for safe use; any generally accepted control measures; emergency and first aid procedures; and the name, address and telephone number of the party who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary. § 1910.1200(g)(2) (App. 24-26).

on the labels arriving from the chemical manufacturers, § 1910.1200(f)(5) (App. 23); (iii) provide employees with information and training on hazardous chemicals, § 1910.1200(h) (App. 29); and (iv) develop and maintain a written hazard communication program that describes how the employer will meet the requirements described above, § 1910.1200(e)(1) (App. 21).

The Office of Management and Budget (OMB), purporting to act under the authority of the Paperwork Reduction Act (PRA), reviewed the provisions of the 1983 Standard and approved that Standard without exception. See 48 Fed. Reg. 53280 (1983) (App. 39).

The 1983 Standard covered only chemical manufacturers, and employers in the manufacturing sector of the economy as defined by Standard Industrial Classification (SIC) Codes 20 through 39. On petitions for review of that Standard filed in the Third Circuit, that court held, *inter alia*, that OSHA lacked a legally adequate rationale for confining the Standard to the manufacturing sector, and OSHA was directed "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless [it] can state reasons why such application would not be feasible." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 739 (3d Cir. 1985) ("USWA I"). When OSHA delayed in carrying out that mandate, the Third Circuit issued a second decision directing the Agency to act on the basis of the original rulemaking record and to complete its reconsideration within sixty additional days. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*).

Subsequently, on August 24, 1987, OSHA promulgated the revised Hazard Communication Standard, extending the coverage of the HCS to all employers covered by the OSH Act. 52 Fed. Reg. 31852-86 (1987). With three modifications that are pertinent here, the substantive provisions of the revised Standard are the same as those of

the 1983 Standard approved by OMB; all the other original provisions apply now to all employers, rather than only those engaged in manufacturing.

The three modifications are as follows.

First, the revised Standard includes a new provision dealing with multi-employer worksites, which provides that if circumstances are such that the employees of one employer may be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter must either provide copies of the MSDSs for those chemicals to the other employer, "or . . . make [the MSDSs] available at a central location in the workplace." § 1910.1200(e)(2) (App. 21-22).<sup>3</sup>

Second, OSHA added a provision exempting from the coverage of the HCS any drug that is "in solid, final form

<sup>3</sup> OSHA did not prescribe any specific procedure for accomplishing the required exchange of MSDSs, stating that "[c]onsistent with the performance-orientation of the rule . . . [t]his is . . . left to the discretion of the [employers]." 52 Fed. Reg. 31865 (1987) (App. 47). "For example, the general contractor could keep and make available [MSDS] in the office on the site." *Id.* Adding that the multi-employer worksite provision "will help ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical," *id.*, the Agency explained the scope and purpose of the provision as follows:

It should be emphasized that the exchange of information is limited to those situations where exposures of other employers' employees may occur. Given the nature of multi-employer work sites in construction, there would be many situations where subcontractors responsible for various phases of the building project would not have employees present during other phases and thus no such exchange would be required. For example, if the electricians are not working near, or at the same time as, the paving contractor, then no interchange is required. But if a painting contractor's workers are using flammable solvents in an area where another subcontractor is welding pipes, this information exchange is vital to ensure proper protection of employees. [*Id.*]

for direct administration to the patient." § 1910.1200(b)(6)(viii) (App. 11-12).<sup>4</sup>

Third, OSHA added an exclusion for any "consumer product," as defined in the Consumer Product Safety Act, "where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." § 1910.1200(b)(6)(vii) (App. 11).<sup>5</sup>

We note that in addition to the two exemptions just described, which apply to all provisions of the HCS,

<sup>4</sup> OSHA explained that "[e]mployees handling such finished drug products would not be exposed to the chemicals involved, and would not need information other than that supplied on the container label under FDA requirements." 52 Fed. Reg. 31863 (App. 45).

<sup>5</sup> OSHA explained why this exception should apply only where the product is used in such a way that worker exposure will be comparable to normal consumer exposure:

One example of such a differentiation in exposure situations involves the use of abrasive cleaners in the workplace. Where these are used intermittently to clean a sink, such as they would be used at home, the cleaners would not be covered under the standard. But if they are used to clean out reactor vessels, thus resulting in a much greater level of exposure, they would be covered. Or if an employee cleans sinks all day long, thus resulting in more frequent exposures, the abrasive would also be included in the hazard communication program.

\* \* \* \*

The key elements of concern to OSHA are as stated in the consumer product exemption included in this rule—that the consumer product be used in the same manner as a consumer would use it (and therefore as intended by the manufacturer when preparing the label information), and that the duration and frequency of exposure be essentially the same as would be experienced by a consumer (and thus the label warnings would provide adequate protection.) A broader exemption than this would not be appropriate to protect workers from occupational exposures that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed. [52 Fed. Reg. 31862, 31863 (App. 43, 45).]

OSHA also exempted from the *labeling* provisions all FDA regulated drugs, whether or not in "solid, final form," and all consumer products that are subject to requirements under the Consumer Product Safety Act, regardless of how the products are used in the workplace. § 1910.1200(b)(5)(ii), (iv) (App. 10-12).

#### B. OMB's Disapproval of Three Provisions of the Revised Standard

On September 10, 1987, OSHA submitted the revised Standard to OMB for review, and, on October 23, OMB, exercising its purported authority under the PRA, disapproved the three new provisions just described.

With respect to the provision requiring employers at multi-employer worksites to exchange MSDSs in certain circumstances, OMB devoted most of its discussion to comments that had been made by industry groups regarding the alleged difficulty of complying with this provision, *see* Pet. App. 30a-32a, including, for example, a complaint that "a minimum of several file cabinets would be required . . . ." Pet. App. 32a. OMB asserted that OSHA had not "demonstrate[d] the practical utility for th[is] requirement," *id.*, and opined that "the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces." *Id.*<sup>6</sup>

<sup>6</sup> It appears that OMB intended by its disapproval to exempt employers at multi-employer worksites not only from the obligation contained in § 1910.1200(e)(2) to make MSDSs available to *other employers*, but also from the obligation imposed on every employer by § 1910.1200(g)(8) to make MSDSs "readily accessible" to the employer's *own employees* "when [the employees] are in their work area(s)." Although OMB actually disapproved only the former provision, OMB characterized its disapproval as applying to "the requirement that material safety data sheets be provided on multi-employer worksites." Pet. App. 25a, 43a. *See also* Pet. App. 32a ("the requirement to bring MSDSs onto multi-employer worksites is disapproved"). Petitioners' brief is ambiguous on this point. *See* Pet. Br. at 12. *But see* Brief of Respondents Associated Build-

With respect to the exclusion of certain drugs, OMB's objection related only to employers "[o]utside the manufacturing sector." Pet. App. 37a. As to those employers, OMB asserted that OSHA "does not explain why all drugs regulated by the FDA are not exempted . . . , *id.*"; and OMB expressed the view that "coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility," *id.*

With respect to consumer products, OMB declared it was not enough for OSHA to exclude from the HCS products that are used in the workplace in the same manner, and with the same duration and frequency of exposure, as the products are used by consumers; OMB insisted that OSHA should "exempt any substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. 36a (emphasis added). OMB justified its approach largely on the ground that it would simplify the compliance tasks of employers. Pet. App. 34a-36a.

In the wake of OMB's action USWA and Public Citizen, Inc. filed in the Third Circuit a "Motion for Further Relief With Respect to Prior Decisions of This Court," urging that the Secretary of Labor and the Director of OMB be "enjoin[ed] . . . from taking any further action in derogation of the [Third Circuit's] orders in [*USWA I* and *II*]," and urging that the Secretary and the Director be held in civil contempt.

ers and Contractors, Inc. ["ABC"] and the Construction Industry Trade Associations at 5 and n.4. If, as ABC appears to suggest, OMB's disapproval was intended to exempt employers at multi-employer worksites from having to make MSDSs available to their *own employees* on site, then OMB inexplicably extended to those employers an exemption that does not apply to any other category of employers.

### C. OSHA's Rejection of OMB's Conclusions

While that motion was *sub judice* OSHA published a Notice of Proposed Rulemaking in which, *inter alia*, the Agency solicited public comment on OMB's critique of the three provisions of the HCS at issue. See 53 Fed. Reg. 29822-56 (1988) (App. 49-103). Without explicitly rejecting OMB's views, OSHA explained in detail the justifications for each of the three provisions OMB had disapproved, and proposed that the provisions be retained intact notwithstanding OMB's views. However, OSHA stated that by operation of the Paperwork Reduction Act, "the provisions disapproved by OMB will be neither effective nor enforceable until OSHA completes this rulemaking." 53 Fed. Reg. 29826 (App. 64).

With respect to multi-employer worksites, OSHA noted that several participants in the rulemaking, including several construction industry employer associations, had emphasized the importance and feasibility of making MSDSs available at the workplace for *all* hazardous chemicals to which an employee may be exposed, whether the chemical is brought to the site by his own employer or by another employer. *Id.* at 29843-44 (App. 90-96). The Agency further noted that its Advisory Committee on Construction Safety and Health had reviewed the multi-employer worksite provision as promulgated by OSHA, and had raised no objections to "the provision for MSDSs to be made available on multi-employer worksites." *Id.* at 29844 (App. 95). OSHA stated that the Agency "still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees." *Id.* at 29845 (App. 101).<sup>7</sup> However, OSHA invited further

<sup>7</sup> Although OMB had suggested that labels and training could substitute for MSDSs, see Pet. App. 32a, OSHA cited testimony establishing that such is not the case. *Id.* at 29844 (App. 96-98). "The consensus of the participants in the rulemaking on the

comment on this issue and on "OMB's suggested approach." *Id.* at 29845 (App. 102).

With respect to the scope of the exclusion of drugs, OSHA noted that the exclusion the Agency had fashioned (covering all drugs in solid form) is quite broad, *id.* at 29838-39 (App. 85-86), and that other drugs were not excluded "in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies," and "since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected," *id.* at 29839 (App. 86). OSHA cited recent experience reported by the American Industrial Hygiene Association confirming that exposure of health care employees to drugs that are not in solid form can indeed cause serious occupational health problems. *Id.* Accordingly, although OSHA proposed one modification of the provisions of the Standard with respect to drugs,<sup>8</sup> the Agency did not propose to adopt OMB's approach of "totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces," but did invite comment on this suggestion. *Id.* at 29839 (App. 89).

With respect to consumer products, OSHA explained in detail (i) that the labels and inserts provided with consumer products generally do not include the kind of hazard information that is needed when the product is

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original final rule was that labels can only provide limited information—the detailed source of information must be the MSDS. Furthermore, adequate training cannot be conducted if the information is not available on the substances involved." *Id.* at 29844 (App. 97). OSHA found this to be as true in the non-manufacturing sector as in manufacturing. *Id.* at 29844 (App. 98).

<sup>8</sup> The proposal would allow certain FDA-approved documents to be considered MSDSs for purposes of the HCS. *Id.* at 29839 (App. 88).

used in an occupational setting,<sup>9</sup> and (ii) that so-called "consumer products" are responsible for an extremely large number of occupational illnesses and injuries. *Id.* at 29834-35 (App. 66-71). The Agency observed that the rulemaking record had conclusively established those points. *Id.* at 29835-36 (App. 71-77). OSHA reiterated that this is the reason the Standard provides an exemption "tied to type and extent of exposure," which "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products . . . and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." *Id.* at 29835-36 (App. 77), quoting 52 Fed. Reg. 31863.<sup>10</sup> OSHA therefore did not propose any change in the consumer product exemption as originally promulgated, but again invited comment on OMB's contrary view. 53 Fed. Reg. 29838 (App. 84-85).

<sup>9</sup> "Of particular concern is that the CPSC label is designed to protect consumers under normal conditions of consumer use, or reasonably foreseen misuse, and is frequently directed towards protection of children unintentionally exposed in the home, rather than being directed towards protection of workers exposed repeatedly, and to potentially large concentrations of the material." *Id.* at 29835 (App. 71).

<sup>10</sup> The Agency noted that notwithstanding the inadequacy of CPSC labels in this context (*see supra* note 9), OSHA had decided in promulgating the HCS "to permit the CUSC labels to suffice [for purposes of the labeling requirements of the HCS] so as not to disrupt the extensive labeling conducted in accordance with [CPSC] rules," *id.* at 29834 (App. 68); and that this exemption from the labeling requirements applies regardless of how a product is used in the workplace. But precisely because CPSC labels do not provide the kind of hazard information that is needed in the occupational setting, OSHA refused to exempt consumer products from the *other* provisions of the HCS (*i.e.*, training and MSDSs), except where the product is used in such a way that employee exposure may be expected to be comparable to normal consumer exposure. *Id.*; *see also id.* at 29835 (App. 71-73).

#### D. The Decision Below

Thereafter, on August 19, 1988, the Third Circuit granted USWA and Public Citizens's motion for further relief in part, holding that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with [the Third Circuit's] orders [in *USWA I* and *II*]," Pet. App. 12a-13a, and directing the Secretary to publish forthwith a notice that the three provisions disapproved by OMB "are now effective," Pet. App. 13a. That court declined, however, to hold the agency officials in contempt. *Id.*

In its opinion the Third Circuit determined that OMB's action is not justified by the PRA. In reaching that result that court relied on two independent grounds: *first*, that the provisions of the HCS at issue do not constitute a "collection of information" within the meaning of 44 U.S.C. §§ 3504(c)(1) & (2), and, therefore, are not subject to OMB review and approval; and *second*, that OMB's action is foreclosed by 44 U.S.C. § 3518(e), which provides that the PRA does not increase OMB's authority "with respect to the substantive policies and programs of . . . agencies . . .," and 44 U.S.C. § 3504(a), which provides that OMB's authority "shall be exercised consistent with applicable law." *See* Pet. App. 8a-11a.

#### SUMMARY OF ARGUMENT

I. (a) The language and structure of the Paperwork Reduction Act are instinct with the understanding that the sole subject covered by the PRA is Federal agency directives to private parties to provide information *to the agency for the agency's use*.

The section setting forth the statutory purposes, for example, is concerned with eliminating the Federal paperwork "burden," which is defined as "the time, effort, or financial resources expended by persons to provide information *to a Federal agency*," 44 U.S.C. § 3501(1); and with maximizing the usefulness and minimizing the

cost of collecting information "*to the Federal Government*", 44 U.S.C. §§ 3501(2) & (3). In keeping with these purposes, the provisions of the PRA that set forth the agency actions required as a condition of making an information collection request require that an agency making such a request reduce the burden on "persons who will provide information *to the agency*." 44 U.S.C. § 3507(a)(1)(B). So too, the Director of the Office of Management and Budget in determining whether an information collection request is to be approved is instructed to consider whether the information will have "practical utility," 44 U.S.C. § 3504(c); and "practical utility" is defined as "*the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion*," 44 U.S.C. § 3502(16). In addition, if OMB disapproves an agency's proposed collection of information, the consequence is that "no person shall be subject to any penalty for failing to maintain or provide information *to any agency . . .*" 44 U.S.C. § 3512.

The legislative history, as well, refers throughout to a Congressional decision "to reduce and minimize the public burden involved in providing information *to the Federal Government*," S. Rep. No. 930, 96th Cong., 2nd Sess. 39 (1980), and says nothing to suggest that OMB's charge extends to substantive requirements that one private party provide information to another private party for the latter's protection.

(b) The definitions of "collection of information" and "information collection request," upon which petitioners place their reliance, do not lead to a contrary conclusion. Those definitions cover "the obtaining or soliciting of facts or opinions *by an agency*," through enumerated methods that correspond to the ways in which the Government customarily demands information for its own use. 44 U.S.C. § 3502(4). This is true of all the information collection methods cited in the definition, includ-

ing "reporting or recordkeeping requirements"; as the legislative history reflects, such requirements cover information that a party must prepare *for the Government's use* (even if the information need not be provided to the Government except upon request).

Nor do the statements in the legislative history discussing information required by the Securities Exchange Commission refer to anything but information which is *filed with the SEC and used by the SEC*, both as a basis for disclosures to the public and for enforcement purposes.

In sum, the sole problem that was presented to Congress for resolution in the PRA was that of the Government's burgeoning demands for information to be provided to the Government for the Government's own use, and the provisions Congress enacted only go so far as to grant OMB authority to address that problem.

(c) OMB's attempt, through regulations, to seize an authority that was not conferred upon the Office by Congress does not change the proper statutory analysis. The question whether the "area of regulation" over which an agency claims authority is one "which Congress ha[s] not committed to it" is uniquely one for the *courts* to decide, and not one on which deference is owed to the agency. *Labor Board v. Insurance Agents*, 361 U.S. 477, 499 (1960). "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Fruit Products Co.*, 322 U.S. 607, 616 (1944).

Moreover, the PRA by its terms does not delegate to OMB the power to define the extent of OMB's own authority, but only to "promulgate rules, regulations, or procedures necessary to exercise the authority provided

by [the PRA]", 44 U.S.C. § 3516; a formulation that plainly refers to the authority provided *in fact* by the PRA, not whatever authority OMB desires to exercise.

II. Even if the provisions at issue here were subject to OMB review, OMB's action invalidating those provisions is still contrary to law. In this case, OMB failed to respect the limits on the Office's authority that Congress drew in PRA § 3504(a), which provides that OMB must exercise its authority "consistent with applicable law," and in § 3518(e), which provides that the PRA shall not be interpreted as "increasing . . . the authority of . . . [OMB] . . . with respect to the substantive policies and programs of departments, agencies and offices . . . ." The legislative history emphasizes the crucial role Congress assigned to these provisions in drawing "*an important distinction between paperwork management and substantive decisions*," S. Rep. No. 930, *supra* at 43. And, contrary to petitioners, these provisions are not drained of all force by PRA § 3518(a), which provides that the authority of agencies to prescribe rules "for Federal information activities" is subject to OMB's authority under the PRA "except as otherwise provided in [the PRA]." And §§ 3504(a) and 3518(e) state what is so "otherwise provided."

In this case, OMB, in reviewing a final regulation promulgated by the Occupational Safety and Health Administration, disregarded both the specific substantive mandate of the statute pursuant to which the regulation was promulgated and OSHA's informed and expert judgment on how to apply that mandate to the issues in the rulemaking proceeding.

In the first regard, OMB ignored § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), which requires OSHA, in regulating employee exposure to hazardous substances presenting significant risks, to promulgate the most protective standard feasible, without engaging in a balancing of costs and benefits. *See American Textile Mfrs. Inst.*

*v. Donovan*, 452 U.S. 490, 509 (1981). OMB disregarded as well § 6(b)(7), 29 U.S.C. § 655(b)(7), which requires OSHA to prescribe the use of such warnings as are necessary "to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure" (emphasis added). OMB thus failed to act in accordance with "applicable law" (PRA § 3504(a)).

In the second regard, OMB did not honor OSHA's judgment as to what the mandate of the OSH Act requires in the case of the Hazard Communication Standard. Instead, OMB, with hardly a backward glance, usurped OSHA's role as the regulator of the employer obligation to protect employee safety and health, by countermanding OSHA's determinations as to what the OSH Act requires here. In so doing, OMB crossed the line drawn in the PRA "between paperwork management and substantive decisions," S. Rep. No. 930, *supra* at 43, and improperly asserted precisely the "authority . . . with respect to the substantive policies and programs of [OSHA]" that § 3518(e) withholds.

## ARGUMENT

### I. THE REVIEW PROVISIONS OF THE PRA APPLY ONLY TO INFORMATION REQUIRED TO BE PREPARED FOR THE GOVERNMENT'S USE

Section 6(b)(5) of the Occupational Safety and Health Act directs the Occupational Safety and Health Administration to promulgate standards for hazardous substances that are designed to

most adequately assure[ ], to the extent feasible . . . , that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

Section 6(b)(7) in turn provides:

Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

Pursuant to the mandate of these provisions, and after conducting a lengthy rulemaking, OSHA issued the Hazard Communication Standard. In promulgating and revising that Standard OSHA determined that to protect employee safety and health as required by §§ 6(b)(5) and (7), it is necessary to place on employers the responsibilities prescribed in the Standard, including specifically the responsibilities prescribed by the three provisions the Office of Management and Budget has disapproved, viz., (i) that an employer at a multi-employer worksite should be required to make material safety data sheets (MSDSs) available on site to other employers whose employees may be exposed to hazardous chemicals used by the first employer, (ii) that employers whose employees are exposed to hazardous "consumer products" should be required to make the MSDSs they receive for these products available to employees, and to provide employees with training respecting the hazards involved, unless the product in question is used in such a way that the duration and frequency of exposure is not greater than that experienced by consumers, and (iii) that employers whose employees are exposed to hazardous drugs that are not in solid, final form should be required to make available the MSDS's they receive for these drugs, and to provide employees with training respecting the hazards involved.

The question presented is whether these three provisions of the Standard are subject to review by the OMB under the Paperwork Reduction Act.

A. As the OSHA standard at issue here illustrates, the logic of the process by which the Government elabo-

rates the law generates a basic distinction between two classes of Government actions requiring private parties to prepare and disseminate information.

In the first, and by far the larger, class, such Government requirements are *means to a further end*: the information is sought for the Government's evaluation and use in determining what substantive policies the Government should follow, what substantive legal rules governing the conduct of private parties the Government should issue, and what law enforcement steps the Government should take.

This Government decisionmaking process, in turn, may generate a class of Government actions requiring private parties to prepare and disseminate information *to other private parties*: Government actions in which the provision of information is *the substantive end of the regulatory process in and of itself*. One option in regulating the conduct of private parties which may prove superior to, e.g., directing a party on how to accomplish a particular task, is to condition that party's right to act on providing information to third parties who will be affected. That is the office of the three provisions of the HCS at issue here; indeed, two of these provisions require only that the covered employers *disseminate* information prepared by others and are thus information requirements in only the most attenuated sense.<sup>11</sup>

In certain situations such a substantive rule will offer the best combinations of flexibility and fairness open to the rulemaker. Automobile brake lights and turn signals, theater fire exit signs and medicine warning labels come readily to mind as familiar examples.<sup>12</sup>

<sup>11</sup> Other aspects of the standard, not relevant here and not disapproved by OMB, provide, in addition, that certain materials be maintained for OSHA's inspection.

<sup>12</sup> As is true in most means/ends analyses, there are the polar extremes in which the distinction is clear and borderline cases in which the distinction blurs: In the situation at hand the Government may obtain and evaluate information and also make that in-

The distinction between these different classes of information requirements is not simply a theoretical one; it is a distinction which goes to the practicalities of the issues presented here. A rational evaluation of the necessity of the first class of information requirement turns on entirely different considerations than an evaluation of the second class.

The question of the necessity of securing information used in Government decisionmaking turns on the costs and benefits of obtaining more information in understanding a particular problem and in arriving at a sound response to that problem.

The question of the necessity of requiring a private party to provide information to another private party, on the other hand, turns on the costs and benefits of providing the information versus the costs and benefits of competing regulatory options, as well as on the costs and benefits to the third party of more information versus less.

The second calculus is, of course, far more complex than the first and, of equal importance, far more likely to turn on the precise terms of an underlying substantive statute.

B. With this background in mind we now turn to the Paperwork Reduction Act's language and structure. These primary materials teach two lessons:

*First*, the PRA goes quite far in empowering OMB to review information requirements of the first kind just described, *viz.*, directives to private parties to make information available to the Government for the Government's use.

*Second*, there is not a single indication that the PRA goes the next step and empowers OMB to review informa-

formation available to third parties for their protection. (We treat this borderline case *infra* at pp. 30-33.) The fact that there are such borderlines does not, of course, destroy the utility of the underlying dichotomy.

tion requirements of the second kind, *viz.*, substantive directives to private parties to make information available to other private parties for the latter's own use.

1. As relevant here, the PRA's purposes are:

(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;

(2) to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information;

(3) to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government;

\* \* \*

(6) to ensure that the collection, maintenance, use and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality. . . . [44 U.S.C. § 3501(1), (2), (3) & (6).]<sup>13</sup>

In pursuit of those purposes, the PRA directs Federal agencies:

(a) not [to] conduct or sponsor the collection of information<sup>14</sup> unless, in advance of the adoption or

<sup>13</sup> Section 3501 identifies two other statutory purposes, which reflect the fact that in addition to its role in reviewing agency collections of information, OMB has other responsibilities under the PRA with respect to managing federal information activities. Thus, one purpose of the Act is "to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices," § 3501(4), and another is "to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, improves the quality of decisionmaking, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to and for the Federal Government," § 3501(5).

<sup>14</sup> The Senate Report explains the meaning of the phrase "conduct or sponsor" as follows:

revision of the request for collection of such information—

(1) the agency has taken actions, including consultation with the Director [of OMB] to—

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency . . . has submitted to the Director the proposed information collection request . . . ;

(3) the Director has approved the proposed information collection request, . . . [and] . . .

(f) [The] agency . . . has obtain[ed] from the Director a control number to be displayed upon the information collection request. [44 U.S.C. § 3507.]

Collections of information are only considered to be conducted or "sponsored" by a Federal agency and subject to the requirements of the Act if:

(i) the agency itself conducts the collection;

(ii) the agency uses a procurement contract to obtain information by way of a contractor; or

(iii) the terms and conditions of a grant or cooperative agreement specifically require that collections of information by a recipient from the public be subject to the clearance requirements of the Act. [S. Rep. No. 930, 96th Cong., 2d. Sess. 25 (1980).]

See also 126 Cong. Rec. 30191 (1980) (remarks of Senator Danforth).

The Director of OMB, in "reviewing and approving information collection requests proposed by agencies," is, in turn, authorized to

determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency. [44 U.S.C. § 3504(c); see also 44 U.S.C. § 3508.]

Five defined terms are used in setting out the foregoing agency obligations and OMB authority, and to have the complete legislative picture we set out those definitions at this juncture:

The term "burden" means the time, effort, or financial resources expended by persons to provide information to a Federal agency [44 U.S.C. § 3502(3)];

The term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods . . . [44 U.S.C. § 3502(4)];

The term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information [44 U.S.C. § 3502(11)];

The term "practical utility" means the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion [44 U.S.C. § 3502(16)]; and

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records [44 U.S.C. § 3502(17)].

Although for the most part the PRA's legislative history does not elaborate on these definitions, one definitional term—"practical utility"—was discussed at some length. The Senate Report states: "The term 'practical utility' means the ability of an agency to actually use as opposed to potentially use the information it collects. An agency may determine it needs information it does not have the capability to use for the purpose intended. Such information would not have practical utility." S. Rep. No. 930, 96th Cong., 2d Sess. 39 (1980) (hereinafter "Senate Report"). The House Report similarly states: "'[P]ractical utility' [refers to] the ability of an agency to use information it receives. . . . Too often, agencies will collect reams of data on the basis of need only to store the data unused." H.R. Rep. No. 835, 96th Cong., 2d Sess. 22 (1980) (hereinafter "House Report").<sup>15</sup>

2. The foregoing is instinct with the understanding that the sole subject covered by the PRA is Federal agency directives to private parties to provide information *to the agency for the agency's use*. Let us enumerate:

*First*, the section setting forth the statutory purposes is concerned with (i) minimizing the paperwork "burden" on private parties, which burden, as we have seen, is defined as "the time, effort, or financial resources expended by persons to provide information *to a Federal agency*"; (ii) minimizing "the cost *to the Federal Government* of collecting, maintaining, using and disseminating information," costs which plainly are associated with information the Government has sought for its own use; and (iii) "maximiz[ing] the usefulness of information collected, maintained, and disseminated *by the Fed-*

<sup>15</sup> See also 126 Cong. Rec. 30190 (1980) (statement of Sen. Danforth) ("practical utility" turns on whether an agency can "demonstrate its capability to use the information once it gets it").

*eral Government*," which, again, can only be read as a reference to information the Government has sought for its own use.

*Second*, the agency actions required as a condition of making an information collection request demonstrate a congressional intent to regulate information sought for the Government's own use: the agency is to eliminate "information collections which seek to obtain information available from another source within the Federal Government"; the agency is to reduce the burden on "persons who will provide information *to the agency*"; and the agency is to formulate plans for "tabulating" the information sought, again a locution that only covers information provided to the Government.

*Third*, the Director of OMB in determining whether the information request proposed by an agency is necessary is given one specific guideline, "to determine whether the information will have practical utility"; and practical utility, as we have seen, means "the ability of an agency *to use information it collects, particularly the capability to process such information in a timely and useful fashion.*" See also the legislative history elaborating on that definition, *supra* at p. 23.

*Finally*, if OMB disapproves an agency's proposed collection of information, the consequence is that the agency's information collection request will not have a "control number" issued by OMB; and in the absence of such a control number, "no person shall be subject to any penalty for failing to maintain or provide information *to any agency.* . . ." 44 U.S.C. § 3512.

3. The PRA's legislative history confirms that the sole question Congress confronted and answered is how to control Government requests to private parties to provide information to the Government for the Government's use.

In the Senate Hearings on the bill, OMB's representative described the scope of the issue addressed by the legislation in the following terms:

Few other topics evoke more public outcry than the amount of time and money the American people expend each year providing or maintaining information for *Federal Departments and agencies*.

. . . . .

No one questions the basic need of the government for information to plan, make policy decisions, operate and evaluate programs, and perform necessary research. The question is rather how much information is essential. [*Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 40-41 (1979) ("Senate Hearings") (testimony of Wayne G. Granquist, Associate Director for Management and Regulatory Policy, OMB) (emphasis added).*]

The Senate Report describes the "basic mission" of the Office of Information and Regulatory Affairs—the office within OMB that is charged with administering the PRA—as "to reduce and minimize the public burden involved in providing information to the Federal Government." Senate Report at 8 (emphasis added). See also *id.* at 11 ("[T]he essential purpose of the legislation" is "to reduce the burden on the public in providing information to the Federal Government.") (emphasis added). The House Report explains that the PRA resulted from "a growing concern that the way the Government collects, uses and disseminates information must be improved." House Report at 3 (emphasis added). See also *id.* at 9 ("[t]he OMB Director is to ensure that the agencies, in developing rules and regulations, use efficient methods to collect, use, and disseminate the necessary information)."

So too, every example of a Federal paperwork requirement that is offered in the legislative history consists of a requirement that information be provided to the Government for the Government's use. Thus, the Senate

Report gives as examples of "Federal paperwork requirements" the following: "tax forms, medicare forms, financial loans, job applications, or compliance reports;" forms that a small business person must file to start or expand a business; forms that doctors and hospitals must file to obtain Medicare reimbursement; and forms needed to apply for Federal grant funds. Senate Report at 3-4. The examples of Federal paperwork requirements given by OMB's representative in the Senate Hearings likewise all consist of requirements to provide information to the Government. See Senate Hearings at 40, 46-55.

Of at least equal importance, we have *not* found a single statement in the entire legislative history of the PRA, including the hearings, reports and debates, that suggests that the statute would apply to anything other than requirements for information to be provided to the Government for the Government's use. Nor have we found a single suggestion that the Federal Reports Act—the PRA's predecessor—applied to substantive rules requiring one private party to provide information directly to another private party for the latter's protection or that the PRA would, or should, apply to this very different class of information requirements. Nor does petitioners' brief cite or quote any such statement. This silence is pregnant with significance.

In all the foregoing ways the legislative materials show that Congress only went so far in the PRA as to authorize OMB to review Federal agency efforts to require that information be provided to the agency for the agency's own use.

C. Petitioners argue that PRA §§ 3502(4) and (11), which define the terms "collection of information" and "information collection request," respectively, indicate an intent to go beyond information provided to the Government for the Government's own use. See Pet. Br. at 20-21. That suggestion is without merit for two reasons.

1. The definitions upon which petitioners place such reliance are framed in a way that does not provide a

direct answer to the question presented here. The term "collection of information" is defined in § 3502(4) as (i) "the obtaining or soliciting of facts or opinions *by an agency*" (emphasis added), (ii) "through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods." Neither half of that definition furthers petitioners' position.

The first half is far more in line with our reading of the PRA than with petitioners' reading. The sense of the words is that it is facts or opinions an agency wishes for its own use that is covered; the main point is that the agency seeks to "obtain" facts or opinions. Petitioners emphasize the inclusion of the words "or soliciting," see Pet. Br. at 24, but that term does not show that the PRA covers situations where information is required for a private party rather than for a Federal agency. To "solicit" is "to endeavor to obtain. . ." *Webster's Third New International Dictionary* 2169 (1986). Thus § 3502(4) fairly read in a natural way provides that there is a collection of information within the meaning of the PRA if an agency obtains or "endeavors to obtain" facts or opinions.<sup>16</sup>

The second half of § 3502(4) consists of nothing more than an enumeration of the ways in which the Government customarily demands information for its own use. Petitioners focus on the inclusion of "reporting or recordkeeping requirements," citing a passage in the Senate Report which states that that phrase refers to "informa-

<sup>16</sup> In this regard § 3502(4) is similar to statutes providing that a person may not "solicit or receive" particular information. See, e.g., Shipping Act of 1984, 46 App. U.S.C. §§ 819, 1709(b) (14); Interstate Commerce Act, 49 U.S.C. § 11910(a) (1); Act of Jan. 12, 1983, 49 U.S.C. § 523(a); Ethics in Government Act of 1978, 5 App. U.S.C. § 202(f) (6) (B), 2 U.S.C. § 702(e) (6) (B). In none of those statutes is the word "solicit" used to refer to anything other than the first stage in the process of "obtaining" or "receiving" information.

tion maintained by persons which may be but is not necessarily provided to a Federal Agency." Senate Report at 40, cited in P. Br. at 43. That Report passage read in its context simply demonstrates an intent to cover the many statutes and regulations that require that information be prepared *for* the Government's use, but which do not require the information to be provided *to* the Government except upon *request*.<sup>17</sup> As the Senate Report puts it, such recordkeeping requirements involve information "maintained by [*sic*; 'to']," albeit not "*directly* provided [*to*]," a Federal agency. Senate Report at 38 (emphasis added). That this was the draftsman's intent is reflected in PRA § 3512, which provides (albeit not in perfect syntax) that in the absence of OMB approval of an information collection request, a person cannot be penalized "for failing to "*maintain* or provide information to any agency. . . ." (emphasis added).<sup>18</sup>

<sup>17</sup> The OSH Act itself contains such a provision in § 8(c) (1), 29 U.S.C. § 657(c) (1), which states that "[e]ach employer shall make, keep and preserve, and make available to the Secretary . . . such records . . . as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses."

<sup>18</sup> See also, *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending, No. 88-849 (where records must be kept so as to be "available for use" *by an agency*, "physical delivery to [the] agency is not essential to the notion of 'collection of information,'" 846 F.2d at 1454, quoted in Pet. Br. at 29).

The norm is that such requirements for "reporting" and/or "record-keeping," as those terms are used in a legion of statutes, refer to the making of reports or the keeping of records for the Government's use. See, e.g., Food, Drug, and Cosmetic Act, 21 U.S.C. § 357(g); Communications Act of 1934, 47 U.S.C. § 219; Interstate Commerce Act, 49 U.S.C. §§ 11144, 11145; Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2217; Controlled Substances Act, 21 U.S.C. § 827; Job Training Partnership Act,

Thus, the definition of "collection of information" in PRA § 3502(4), even standing alone, does not evidence an intent to go beyond information that is collected by the Government for the Government's own use. And the definition of "information collection request" sheds no further light on the subject: an "information collection request" is simply a particular requirement "calling for the collection of information." § 3502(11).

2. In all events, these definitions do not stand alone. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), in turn quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122 (1849)). See also *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S. Ct. 1811, 1817 (1988). And, as we have shown, the statutory language and the statutory scheme considered as a whole plainly contemplates that OMB's review function is limited to information that is provided to an agency for the agency's own use.

D. Petitioners make much of statements in the PRA hearings and Committee Reports disapproving the Securities Exchange Commission's claim that under the PRA's predecessor—the Federal Reports Act—information requests were subject to clearance "only [in] situations where answers provided by respondents are to be used for statistical compilations of general public interest." Senate Report at 13. See also House Report at 23. On that ground, the SEC had refused to allow review of any of

29 U.S.C. § 1575; Federal Deposit Insurance Act, 12 U.S.C. § 1892(b); Horse Protection Act of 1970, 15 U.S.C. § 1823(d), (e); Egg Research and Consumer Information Act, 7 U.S.C. § 2706(c); Solid Waste Disposal Act, 42 U.S.C. § 6992b(c); Intergovernmental Personnel Act of 1970, 42 U.S.C. §§ 4764, 4765. There is nothing to suggest that the PRA uses the terms in any broader sense.

its "disclosure- or enforcement-related information gathering." House Report at 23. And the SEC argued that the PRA should be limited to such statistical information. See P. Br. at 38-45. The Congressional discussion of the SEC's contentions does not advance petitioners' position.

The Senate Report states that "documents filed with" the SEC should be subject to paperwork review even if the documents are collected by the Agency "to form the basis for disclosure to the public." Senate Report at 39 (emphasis added). The Report goes on to state that in determining whether such information will have "practical utility," OMB "should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of [investors and others]." *Id.* at 39-40 (emphasis added).<sup>19</sup>

Given the PRA's purposes it is neither surprising nor revealing that the position advanced by the SEC—viz., that independent agencies, unlike other agencies, should be allowed to require the public to submit information to the agencies with no OMB review except where the information is used for statistical compilations—was "viewed . . . skeptically." P. Br. at 42. Nor is Congress' resolution of the issue posed by the SEC—to make the PRA applicable to all information provided to any Federal agency for the agency's use, whether the agency's purpose in requiring the information is to make statistical compilations, to develop policy, to determine com-

<sup>19</sup> SEC Commissioner John R. Evans had explained in the hearings that "information collection by" the SEC serves "many different purposes," one of which is that "information is collected that forms a basis for disclosure to the public." Senate Hearings at 66-67. Thus, while the information is ultimately "intended for use of the investing public," it is "collect[ed by]" the SEC in the form of "filings pursuant to the Federal securities laws." *Id.* at 67. See also *Paperwork Reduction Act of 1980: Hearings on H.R. 6410 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 330 (1980) ("House Hearings") (testimony of SEC Chairman Harold M. Williams).

pliance, or to review the information for the purpose of making it available to the public—surprising or revealing. Any other resolution would have required the drawing of lines more nice than obvious. In particular, information provided to any agency for its own enforcement purpose and for disclosure to the public is at the borderline between—perhaps more accurately is on both sides of—the line between the two general classes of information requirements that we described at the outset of our argument. *See supra* at pp. 18-20. Faced with the choice between including some such information demands within the PRA or all such information demands Congress chose the latter course.<sup>20</sup>

But the essence of the matter is this: the entire debate takes place in the context of documents required to be “filed with” an agency and there is no suggestion that documents prepared solely for the use of private parties, and not “filed with” an agency were intended to be covered. In words of one syllable, the only problem that was presented to Congress for resolution in the PRA was that of the Government’s burgeoning demands for information to be provided to the Government for the *Government’s own use*; and the provisions Congress enacted grant OMB authority to address only that problem,

<sup>20</sup> That choice had much to commend it. First, when an agency demands information for its own use, the agency’s institutional interests are often involved (including budgetary considerations, which may make it appealing to the agency to demand that the public gather information the agency would otherwise have to gather on its own), and OMB oversight may reasonably be thought to be a particularly useful counterweight. Second, the danger of OMB interference with regulatory policy, which Congress sought to minimize, *see* Part II *infra*, is greatest where an agency does not require that information be provided to the agency for its own use, but requires instead that information be provided directly to the public for its use pursuant to a substantive rule. Third, although the broad definition of “collection of information” in the PRA is easy enough to apply in its proper context (that of information provided to the Government for its use), if applied outside that context it expands beyond any sensible bounds, to encompass fire danger signs, traffic signals and so on.

*see supra* at pp. 24-30. Nothing in Congress’ response to the issue raised by the SEC suggests that the PRA has any broader reach.<sup>21</sup>

E. All else failing, OMB falls back on its own regulations and pleads for deference to the Office’s own view of its own regulatory authority. The OMB regulation relied on provides that the Office has the authority to

<sup>21</sup> Petitioners quote a statement by Senator Chiles in the hearings to the effect that the SEC should be treated the same as EPA and OSHA. *See* P. Br. at 42, citing Senate Hearings at 85. That statement provides no basis for inferring that Senator Chiles (let alone Congress as a body) thought that OMB had any role to play in reviewing substantive OSHA standards such as the yet-to-be-promulgated HCS. The only OSHA information activities mentioned anywhere in the legislative history are *reporting* requirements, not substantive standards. Specifically, in the hearings OMB praised OSHA for its then-recent and well-publicized decision to exempt small employers from OSHA’s general reporting requirements; a decision which “eliminated 40,000 American businesses from OSHA forms” and was characterized by OMB as a significant step in “reducing the frequency with which information is sent to the Government.” House Hearings at 104-105 (emphasis added) (testimony of Wayne G. Granquist, OMB).

Former Senator Chiles has submitted a brief *amicus curiae* in which he quotes (at pp. 18-19) a statement he made on the Senate Floor when the PRA was reauthorized in 1986. Even if the statement in question had referred specifically to substantive public information requirements such as those at issue here—and the statement does not—this pronouncement by a single Senator, which was not the subject of any legislative action taken by Congress at the time, would be entitled to no weight in construing the 1980 PRA. *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977). Nor is there any significance, as Senator Chiles suggests in his brief at 19, n.5, to the fact that a subsequent Congress declined the invitation of respondent Public Citizen “to make . . . absolutely clear, once and for all,” that the PRA does not apply generally to disclosures to the public. Particularly given that Public Citizen was only asking Congress to clarify what the witness asserted the 1980 Act already meant, the fact that Congress did not act on that request does not suggest that the Congress to which the request was made—to say nothing of the earlier Congress that enacted the legislation—disagreed with the interpretation Public Citizen espoused.

review federally mandated "posting, notification, labeling, or similar disclosure requirements" addressed directly to the public and not filed with the Government. 5 C.F.R. § 1320.7(c)(2).<sup>22</sup> That regulation is not entitled to any deference.

<sup>22</sup> It is not clear, however, that the regulations, even if accepted on their own terms, would lead to the conclusion that all of the provisions of the Hazard Communication Standard that were disapproved by OMB constitute "collection of information." The regulations state that "[t]he public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within th[e] definition [of 'collection of information']." 5 C.F.R. § 1320.7(c)(2). The preamble to the regulations offers as an example the federal requirement that warning labels be placed on cigarette packages. "Although the label is a federally-mandated disclosure, no collection of information is involved, since the persons subject to the requirement need only transmit to the public information supplied by the federal government." 48 Fed. Reg. 13675 (1983).

While the regulation and the example discussed refer to information provided by the Federal government, OMB has made clear that the identity of the source of the information is not critical: the crucial distinction is whether the party making the disclosure is provided with the information, or must develop the information itself. Thus, OMB explained that the proviso in § 1320.7(c)(2) was added "to make clear that disclosure and labeling requirements are covered only to the extent that they implicitly or explicitly require a person to collect information for the purpose of the disclosure or labeling." 48 Fed. Reg. 13675 (1983).

Given this distinction, if the transmittal of warnings provided by the Government is not a "collection of information," then neither is the transmittal from an employer to his employees (or to other employers) of MSDSs received from a chemical manufacturer.

Even apart from the consideration just discussed, there are additional reasons why the provisions of the HCS that were disapproved by OMB do not constitute "collection of information" within the meaning of PRA § 3502(4). For example, petitioners strain to assert that the *training* requirements of the Standard, which were disapproved as applied to certain drugs and consumer products, are "reporting requirements." Pet. Br. at 22. To "report," however, is not simply to provide information, but to provide an "account;" that is, to relate information "as the result of" a

1. The determination whether there has been a "legislative delegation to an agency [to resolve] a particular question," *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) depends on "th[e] particular context [involved]," *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 670 (1985). Simply put, the context here is whether OMB—in claiming authority to review substantive requirements that information be provided directly to private parties for their use—has undertaken "a movement into a new area of regulation which Congress had not committed to it." *Labor Board v. Insurance Agents*, 361 U.S. 477, 499 (1960) (emphasis added).

As the Court recognized in *Insurance Agents*, in this context the determination of the agency's statutory authority is uniquely one for the courts: "[W]here Congress has given [an agency] a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked." *Id.* (emphasis added).<sup>23</sup> See also, *Addison v. Holly Hill Fruit Products*

search or inquiry. See *Webster's Third New International Dictionary* 1925 (1986) (emphasis added). An employer who provides hazard training to employees is not "reporting" to them.

Similarly, in arguing that a required exchange of MSDSs on multi-employer worksites is a "recordkeeping requirement," Pet. Br. at 23 n.11, petitioners assume, among other things, that an MSDS is a "record" within the meaning of §§ 3502(4) & (17). But the term "record" does not necessarily encompass any and every kind of document; the term is frequently used to connote a particular kind of document—one made to preserve evidence that some act or event occurred. See *Webster's Third New International Dictionary* 1898 (1986). This is the most natural meaning of the term as it is used in the phrase "recordkeeping requirements;" and an MSDS is not a "record" as so defined.

<sup>23</sup> See, e.g., *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980) (analyzing in detail the statutory language and legislative history respecting the extent to which interpretive authority had been delegated to a particular agency, in order to determine the deference owed the agency's interpretation); *Process Gas Consumers Group v. United States Department of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) ("The extent to which

Co., 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function.")<sup>24</sup>

The issue here, in other words, is qualitatively different from that considered in such cases as *Chevron U.S.A. v. National Res. Def. Council*, *supra*. In *Chevron* the issue concerned the deference to be shown to agency "rules to fill any gap left [in a congressionally created program], implicitly or explicitly, by Congress" and to agency "accommodation of conflicting policies that were committed to the agency's care by the statute." 467 U.S. at 843, 845 (internal quotations omitted). Here the issue is

courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue'" (quoting *Constance v. Secretary of Health and Human Services*, 672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)).

<sup>24</sup> It is therefore not surprising that this Court has repeatedly found it appropriate to determine, on a *de novo* basis, the meaning of substantive statutory terms that affect the basic scope of an agency's delegated authority. See, e.g., *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (Federal Reserve Board overstepped its authority when it extended its regulations to "non-bank banks"); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion) (rejecting Secretary of Labor's interpretation of substantive provisions in the Occupational Safety and Health Act, because "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (Court required to decide whether Secretary properly construed his authority); *Packard Co. v. Labor Board*, 330 U.S. 485, 493 (1947) (Court made *de novo* inquiry into meaning of statute, stating "[w]e are not at liberty to be governed by . . . policy considerations in deciding the naked question whether the Board is now . . . acting within the terms of the statute").

whether the OMB rule addresses a subject *outside* the limits of the program Congress created in the PRA and whether OMB is proposing an accommodation of policies that were *not* committed to the office's care by the PRA. Plainly these latter issues are ones for judicial not for agency resolution.<sup>25</sup>

2. The statutory language and legislative history of the PRA, moreover, show that the last thing in Congress' mind was to delegate to OMB the function of determining the limits of the Office's own authority over other Federal agencies.

The statute provides that OMB's role in promulgating regulations is to "promulgate rules, regulations, or procedures necessary to exercise *the authority provided by this chapter*." 44 U.S.C. § 3516 (emphasis added). Thus, OMB is not charged with *defining* "the authority provided by this chapter;" to the contrary, OMB's "rules, regulations or procedures" are authorized only to the extent that they are necessary to exercise what is *in fact* "the authority provided by this chapter."

As we discuss more fully *infra* at pp. 39-40, Congress was acutely aware of OMB's penchant for aggrandizing its power at the expense of other agencies, and Congress was mindful of the need to check that propensity. Thus, PRA § 3518(e), which provides that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of . . . [OMB] . . . with respect to the substantive policies and programs of departments,

<sup>25</sup> See e.g. *K Mart Corp. v. Cartier, Inc.*, *supra*, 108 S. Ct. at 1817 (administrative interpretation not entitled to deference, even within a sphere where deference would otherwise be owed, if the intent of Congress is clear). For a more general treatment, in a related context, of the subject of deference to administrative interpretations, see the Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Neither Party in *Michigan Citizens for an Independent Press, et al. v. Richard Thornburgh, et al.*, No. 88-1640.

agencies and offices . . .," was adopted out of "concern that the authority in this Act might be used to increase the power of OMB over substantive policy." Senate Report at 56. The Senate Report further states:

The Committee notes that there have been problems along that line in the past. It has been argued that the Federal Reports Act—which S.1411 amends—was used to interfere with regulatory policy under the guise of clearing information requests.

. . . .

The bill has provisions to guard against that. [*Id.*]

To paraphrase Professor Sunstein's pithy characterization of the basic reason why agencies should not generally be free to define the scope of their own powers, Congress, knowing OMB's tendency to play the "fox" determined not to leave OMB in sole charge of "guard[ing] the henhouse." See *Judicial Review of Administrative Action in a Conservative Era*, 30 Admin. L. Rev. 353, 368 (1987) (remarks of Professor Cass Sunstein in panel discussion).

Particularly against this background, the delegation contained in § 3516 should be construed in accordance with its plain meaning: OMB has *no* authority to define the extent of its authority, but only to adopt rules and procedures to exercise the authority Congress in fact intended to confer.

In sum, Congress' intent in the PRA was to authorize OMB to review Federal agency requirements that information be provided to the agency for the agency's own use; the PRA does not go further and grant OMB the authority to review substantive regulatory rules such as those here that require one private party to provide information to another private party for the latter's protection. OMB's attempt to expand its authority beyond the area covered by the PRA must be rejected.

**II. EVEN IF THE PROVISIONS AT ISSUE WERE SUBJECT TO REVIEW UNDER THE PRA, OMB EXCEEDED THE LIMITATIONS IN THAT ACT WHICH REQUIRE OMB TO ADHERE TO "APPLICABLE LAW" AND WHICH DENY OMB AUTHORITY OVER "SUBSTANTIVE POLICIES AND PROGRAMS" ENTRUSTED TO OTHER AGENCIES**

In crafting the PRA, Congress took pains to ensure that OMB's authority to review an information collection request does not lead to interference with the requesting agency's substantive regulatory authority. In this case, OMB did not respect that Congressional limit on the Office's authority.

A. The PRA contains two provisions that prevent OMB from using its paperwork review authority as a lever for exercising the substantive regulatory authority Congress has entrusted to the agency requesting the information. Section 3504(a) provides that "[t]he authority of [OMB] . . . shall be exercised consistent with applicable law," and § 3518(e) provides in pertinent part that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of . . . [OMB] . . . with respect to the substantive policies and programs of departments, agencies and offices. . . ."

The PRA legislative history emphasizes the importance Congress placed on these provisions as a means of keeping OMB within proper bounds. The Senate Report, as already noted, states "that there ha[d] been problems . . . in the past" with OMB's performance under the Federal Reports Act, including, most particularly, that OMB's review activities "w[ere] used to interfere with regulatory police under the guise of clearing information requests." Senate Report at 56. The Report goes on to state:

The [PRA] bill has provisions to guard against that. Section 3518(e) provides that the bill does not affect in any way the powers of the President or OMB respecting the substance of agency policies. Thus S.1411 draws an important distinction between

*paperwork management and substantive decisions.*  
[*Id.* (emphasis added)].

Similarly, in discussing the review procedures established in § 3504(h) of the Act, the Senate Report "emphasi[zes] that the Director of OMB's authority must conform with the provisions of Sections 3504(a) and 3518(e)." *Id.* at 43.<sup>26</sup>

Despite all this, petitioners maintain that these provisions add nothing to the PRA regarding how OMB is to review information collection requests and were intended simply to express the tautology that OMB's authority "extends *only* to the review of information collection requests, and no further." Pet. Br. at 34 (emphasis in original). That reading of the PRA is untenable.

As a practical matter petitioners suggestion read PRA §§ 3504(a) and 3518(e) out of the Act. That suggestion, moreover, cannot be squared with Congress' admonition that OMB not lose sight of the "important distinction between paperwork management and substantive decisions." Senate Report at 56.

Petitioners argue, too, that §§ 3504(a) and 3518(e) are drained of all force by § 3518(a), which provides that:

Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director [of OMB] by this chapter.

<sup>26</sup> See also 126 Cong. Rec. 30178 (1980) (Senator Chiles) ("S. 1411 was designed to insure that all agencies can vigorously enforce their substantive mandates from the Congress. Section 3518 specifically states that this bill does not change existing relations of the President and OMB with respect to the substance of agency programs.")

But § 3518(a) states that agency rules and procedures for information activities are subject to the authority conferred on OMB by the PRA "[e]xcept as otherwise provided in [the PRA]." It is therefore necessary to refer to other provisions of the PRA, including §§ 3504(a) and 3518(e), to see what is "otherwise provided." And, in § 3504(a), it is "otherwise provided" that OMB must act in accordance with applicable law, and in § 3518(e) it is "otherwise provided" that the PRA does not increase OMB's authority with respect to "substantive policies and programs [of other agencies]."

Accordingly, § 3518(a), by its terms, means no more than that an agency's information activities are subject to OMB's authority under the PRA *so long as OMB acts in accordance with the applicable substantive law governing the requesting agency and OMB does not seek to extend its authroity so as to exercise the requesting agency's authority to make substantive policy determinations.* To harmonize § 3504(a), 3518(a) and 3518(e) in this way is to give full force to the plain meaning of each provision, and to honor "the well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Inst. v. Donovan*, 425 U.S. 490, 513 (1981) (plurality opinion); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

We hasten to add that the approach just outlined has a limited application. Most Federal agency information collection requests seek information for use in formulating policy or in determining compliance. Although such requests are an important aspect of the policymaking and rulemaking processes,<sup>27</sup> as we noted at the outset, those

<sup>27</sup> See House Report at 22: "Information gathering is essential for formulating policy as well as for managing regulatory programs. Determinations of compliance with regulation often are made on the basis of information collections." The House Committee in acknowledging the relationship between "policymaking and information management," and in acknowledging that the two cannot always be separated, see Pet. Br. at 44, was focusing on such uses of information. See House Report at 22-23. See also House

processes are rarely subject to specific statutory directives mandating that decisionmaking be performed in any particular way on the basis of any particular body of information.<sup>28</sup> Thus, while an agency may strongly believe that certain information is useful as a guide to formulating policy or assessing compliance it will rarely be the case that OMB's disagreement with the agency concerning such a matter involves a potential conflict with a specific statutory mandate.

• But where, as in this case, OMB seeks in a paperwork review to pass judgment on the manner in which an agency has *directly regulated the conduct of those the agency is charged with regulating*, there is a clear danger that OMB will act inconsistently with "applicable law" (§ 3504(a)), and will attempt to assert "authority . . . with respect to the substantive policies and programs [of the agency]" (§ 3518(e)). And, as we now show, that danger eventuated here.

B. It is not necessary in this case to define the precise point at which "paperwork management" becomes "substantive decision[making]" nor is it necessary to enumerate every respect in which an OMB disapproval of an information collection request might be "contrary to applicable law." For here it is plain that OMB has strayed deep into the substantive area entrusted to another agency's

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Hearings at 319 (letter of Robert R. Bruce, General Counsel, FCC) ("[I]t is not possible to separate information management from substantive agency policymaking. Information gathering is essential to formulating policy, and a principal means of enforcing regulation is to verify compliance through information collection."); Senate Hearings at 81-82 (testimony of Tyrone Brown, Commissioner, FCC) (OMB review of logkeeping requirements by which FCC "monitor[s] compliance" with broadcast rules "could have the effect of frustrating the adoption or implementation of [agency] policies").

<sup>28</sup> For example, § 8(c) of the OSH Act, 29 U.S.C. § 657(c), simply authorizes OSHA to prescribe such reporting and record-keeping requirements "as necessary or appropriate for the enforcement of this chapter. . . ."

care and has acted in a manner contrary to the applicable substantive law.

OMB, in reviewing a final regulation promulgated by the requesting agency, disregarded both the specific substantive mandate of the statute pursuant to which the regulation was promulgated and the agency's informed and expert judgment on how to apply that mandate to the issues in the rulemaking proceeding. In the first regard OMB failed to act in accordance with applicable law (§ 3504(a)), and in the second OMB failed to defer to the requesting agency's authority over the "substantive policies and programs" entrusted to that agency's administration (§ 3518(e)).<sup>29</sup>

I. The OSH Act specifies in no uncertain terms the manner in which OSHA is to resolve the tension between costs and employee protection in fashioning standards regarding toxic materials and harmful physical agents, and, in particular, in fashioning hazard communication requirements.

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<sup>29</sup> Petitioners create out of whole cloth the notion that under these provisions OMB has *carte blanche* to overturn whatever "information collection methods" a regulatory agency may adopt, Pet. Br. at 35 (emphasis added), thus leaving a regulatory agency with only the "authority to determine, in accordance with its statutory mandate, its regulatory objectives," *id.* (emphasis added). More than petitioners' *ipse dixit* is required to establish the unlikely proposition that when Congress referred to "applicable law" and "substantive policies and programs," the Legislature was referring only to regulatory "objectives," and not regulatory "methods."

In particular, the phrase "policies and programs" is most naturally read to include both "objectives" and "methods." Nor does petitioners' proffered distinction have any operational content. In this case, OMB disapproved provisions that OSHA believed (and continues to believe) are essential for the protection of worker health and safety. See *supra* at pp. 6-8, 10-12. The debate as to whether this was a disagreement as to "objectives" or "methods" is totally devoid of substance. But if it were necessary to pursue the point, we think it clear that OMB did *not* honor OSHA's objective, prescribed by the OSHA Act, of protecting employees from significant health risks to the greatest extent feasible. See *infra* at pp. 44-46.

As this Court held in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) ("ATMI"):

[Section] 6(b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then . . . , Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard . . . that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5) [ellipses in original].

And, insofar as hazard communication is concerned, a second provision of the OSH Act, § 6(b)(7), further requires that standards

*shall prescribe* the use of labels or other appropriate forms of warning as are necessary to *insure* that employees are apprised of *all hazards* to which they are exposed, relevant symptoms and appropriate emergency treatment, and *proper conditions and precautions of safe use or exposure*. [emphasis added.]<sup>30</sup>

In promulgating the provisions at issue here, OSHA found the Standard to be feasible, *see* 52 Fed. Reg. 31855-58 (1987),<sup>31</sup> and the Agency explained why each provision is necessary to reduce significant risks to worker health. *See* 52 Fed. Reg. 31865 (App. 47) (multi-employer worksite provision is "vital to ensure proper protection of employees"); 52 Fed. Reg. 31863 (App.

<sup>30</sup> The final sentence of § 6(b)(7) also directs OSHA to consult on such matters with "the Secretary of Health and Human Services" (*viz.*, with the National Institute for Occupational Safety and Health, an expert scientific body created by the OSH Act within the Department of Health and Human Services, *see* 29 U.S.C. §§ 669(e), 671). The statute does *not* provide for any such consultation with OMB.

<sup>31</sup> An OSHA standard is feasible if it is "capable of being done." *ATMI*, 452 U.S. at 508-09.

45) (only finished drugs in solid form were exempted from the HCS because only employees handling such products "would not be exposed to the chemicals involved, and would not need information other than that supplied on the container label under FDA requirements"); *id.* at 31863 (App. 45) ("A broader [consumer product] exemption than [OSHA promulgated] would not be appropriate to protect workers from occupational exposures that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed.") OSHA reiterated these points with even greater emphasis in the Federal Register notice the Agency published in response to OMB's action at issue in this case. *See supra* at pp. 10-12.

Under § 6(b)(5), as construed in *ATMI*, as well as under § 6(b)(7), these findings by OSHA amounted, as a matter of law, to a determination that the provisions at issue are dictated by the mandate of the OSH Act. *See ATMI*, 452 U.S. at 509 (if a protective provision is within the bounds of feasibility, "[a]ny standard . . . that strikes a different balance . . . would be inconsistent with the command set forth in § 6(b)(5)"); *Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988) ("[I]f in fact a [particular provision] would further reduce a significant health risk and is feasible to implement, then the OSH Act *compels* the agency to adopt it (barring alternative avenues to the same result).") (quoting *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (emphasis in original).)<sup>32</sup>

<sup>32</sup> In fact, the draft Federal Register notice OSHA submitted to OMB in March 1988 characterized the broadened consumer products exception urged by OMB as "certainly inconsistent with the mandate of the OSH Act as well as the purpose and intent of the HCS." *See* Occupational Safety and Health Reporter, Current Report (BNA) (March 16, 1988), at 1558. However, when the Federal Register notice was published after OMB review, that sentence was deleted, no doubt in a further required obeisance to OMB. *Compare id.* with 53 Fed. Reg. 29835 (App. 71).

Pursuant to §§ 3504(a) and 3518(e) of the PRA, OMB was required to adhere to this mandate of the OSH Act as construed by OSHA. *See supra* at pp. 39-42. OMB did not do so.

To put it mildly, there is no indication that OMB sought to adhere to § 6(b)(5)'s mandate that standards must provide the greatest level of protection that is "capable of being done," *ATMI, supra*, 452 U.S. at 509, or the mandate of § 6(b)(7) that hazard communication mechanisms must "insure" that employees are apprised of "all hazards" and of "proper conditions and precautions of safe use or exposure." Instead, OMB's chief preoccupation was with industry claims of burden or inconvenience, even at the mundane level of, *e.g.*, the need to obtain file cabinets, *see supra* at p. 8, and with a fetishistic desire to ensure that employers will be subject to the requirements of only one regulatory agency, even though those requirements do not purport to protect employees or to meet the OSH Act's requirements, *see supra* at p. 9.<sup>33</sup>

<sup>33</sup> Although this point holds true with respect to OMB's disapproval of each of the three regulatory provisions at issue, it is perhaps most obvious with respect to the coverage of consumer products. OSHA's analysis of OMB's comments on this subject, together with the record evidence, establish that OMB is simply wrong in assuming that the labels prescribed by the Consumer Product Safety Commission provide the kind of information that employees need if the employees are to use a product safely in industrial settings and at industrial levels of exposure. *See supra* at pp. 11-12.

In particular, to use the words of § 6(b)(7) itself, CPSC labels do not provide information as to "proper conditions and precautions of safe use or exposure" in the industrial setting. OSHA's treatment of consumer products was carefully tailored to address this reality. Yet OMB ordered OSHA to exempt from the HCS every "substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product." Pet. App. 36a (emphasis added). It

2. Even if there were any indication in its statement of reasons that OMB was mindful of its obligation under PRA § 3504(a) to comply with "applicable law" in the form of §§ 6(b)(5) & (7) of the OSH Act—and all indications are to the contrary—OMB certainly did not honor OSHA's judgment as to what the OSH Act's mandate entails.<sup>34</sup> Rather, without any pretense that OSHA's understanding of the OSH Act's substantive requirements is wrong as a matter of law, OMB simply countermanded OSHA's determinations on what the OSH Act requires here. In so doing OMB improperly asserted precisely the "authority . . . with respect to the substantive policies and programs of [OSHA]" that

cannot seriously be maintained that this approach is consistent with §§ 6(b)(5) and (7).

OMB drew its proposed exemption from EPA regulations under the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499. *See* Pet. App. 36a. As OSHA explained, that makes no sense, because "SARA entails informing the general public and emergency response facilities about chemicals in their neighborhoods that could cause hazardous conditions during emergency situations[, while t]he HCS involves informing employees about the chemicals they are potentially exposed to on a day-to-day basis as a result of their work." 53 Fed. Reg. 29837 (1988) (App. 79). "As [the SARA] exemption is . . . not related to the extent of employee exposure—which is the concern of OSHA in the HCS—it is not appropriate for this rule." *Id.*

<sup>34</sup> *Amicus Curiae* Business Council on the Reduction of Paperwork (BCORP) praises OMB for "perceiv[ing as . . . its] role" a "balancing act" between the benefits and burdens of information production; and BCORP states that OMB performed just such a "balancing act" here. *See* BCORP Brief at 22 n.10. If that is how OMB perceives its mission—and the materials cited by BCORP, *id.*, so indicate, as does an article co-authored by a former OMB Administrator for Information and Regulatory Affairs, *see* DeMuth and Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075 (1986)—it explains where OMB has gone wrong in this case. For in the OSH Act, "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *ATMI*, 452 U.S. at 509.

§ 3518(e) withholds. It would be difficult to imagine a clearer instance of defiance by OMB of the "important distinction" drawn by § 3518(e) "between paperwork management and substantive decisions." Senate Report, *supra* at 56.

For this reason, even if the provisions OMB disapproved were otherwise subject to review under the meaning of the PRA, OMB, by usurping OSHA's role as the regulator of the employer obligation to protect employee safety and health, exceeded the explicit limits placed on the Office's authority by the PRA.<sup>35</sup>

<sup>35</sup> Indeed, OMB exacerbated this disregard for governing law by proceeding in a manner directly at odds with a clear command of the United States Court of Appeals for the Third Circuit, directing OSHA to complete the rulemaking here within 60 days of that court's order. Pet. App. at 4a, citing *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987). As the Third Circuit stated, OMB's intervention, which resulted in the withdrawal of three provisions of the HCS, is "inconsistent with" that order. Thus, OMB violated the constraint imposed on the Office by PRA § 3504(a) which certainly includes a prohibition on acting in a manner "inconsistent with" validly entered court orders.

So far as we can tell, petitioners simply assume that a Federal agency that is subject to a final order directing the completion of a rulemaking by a date-certain, may rely on the PRA to disobey that order. That, however, is not, and cannot be the law. Indeed, PRA § 3504(a) itself forecloses this position.

Had petitioners wished to reserve the possibility of post-deadline amendments to the regulation resulting from OMB's review under the PRA, the appropriate time to raise that concern with the Third Circuit was when that court issued its order setting a sixty-day deadline. But petitioners did no such thing, nor did they seek this Court's review.

Thus, OMB's October 23, 1987 action disapproving the provisions of the HCS at issue is plainly inconsistent with the "applicable law" commanding that the rulemaking be completed by August 27, 1987.

## CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,  
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, requires the Office of Management and Budget (OMB) to review agency "information collection requests" to determine "whether the collection of information is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c) and 3508). The central question in this case is whether certain provisions of the Department of Labor's hazard communication standard contain such requests and therefore require OMB review. As our opening brief demonstrates, the PRA's definition of the term "information collection request" provides a straightforward and sensible answer to this question. The United Steelworkers of America, Public Citizen, and Building and Construction Trades Department, AFL-CIO, nevertheless propose an alternative analysis that relies on the "instinct" (Br. 13, 24) of the

statute.<sup>1</sup> This unusual analysis produces confusing and irrational results.

1. We begin by reminding the Court of the procedural posture of this dispute. The court of appeals concluded that the Secretary of Labor's submission of the hazard communication standard to OMB for PRA review violated the court's previous orders because OMB lacked authority to review the pertinent provisions. The court acknowledged that OMB is required to review "information collection requests" (Pet. App. 1a-13a), but it concluded that the provisions at issue "are insulated from OMB authority" because they do not "require the 'collection of information'" and they "embod[y] substantive policy decision making entrusted to [the Secretary of Labor]" (*id.* at 8a). Thus, the court of appeals' determination that the Secretary had violated the court's previous orders necessarily depended on its conclusion that OMB lacked authority to review the hazard communication standard. If the pertinent provisions contain "information collection requests" that are subject to OMB review, the court had no conceivable basis for entertaining this contempt action.<sup>2</sup>

<sup>1</sup> We shall refer to those three parties, which have filed a joint brief urging affirmance of the court of appeals' decision, as the "respondents." The other parties responding to the government's petition—the Associated Builders and Contractors, Inc. and the Construction Industry Trade Associations—have filed a brief urging reversal of the court of appeals' decision.

<sup>2</sup> Respondents suggest (Br. 48 n.35) that, whether or not OMB has authority to review the hazard communication standard, the Secretary's submission of the standard to OMB violated the court of appeals' "clear command." This suggestion is without foundation. The court of appeals' previous order had stated, under threat of contempt sanctions, that the Secretary shall

within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all

2. We believe that the PRA definitively answers the question whether the hazard communication standard contains "information collection requests." The statute specifically defines the term "information collection request" to include a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (1982 & Supp. V 1987)). As we explained in our opening brief, the hazard communication provisions at issue here, which require employers to gather, store, and disseminate documents and other information, impose, at a minimum, both reporting and recordkeeping requirements and therefore fall within that definition. See Gov't Br. 18-25. Thus, application of the statute's express definitions resolves the matter.

While our submission is straightforward, respondents' reply is quite complex. Respondents argue (Br. 19) that there is an inherent distinction between information collection requests that are the "means" to a regulatory end and information collection requests that are themselves a "substantive end." Based on this general principle,

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workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

*United Steelworkers of America v. Pendergrass (USWA II)*, 819 F.2d 1263, 1270 (3d Cir. 1987) (footnote omitted). The court of appeals' order, which prohibited the Secretary from gathering additional record evidence, is inconsistent with this Court's decisions in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940), and *Fly v. Heitmeyer*, 309 U.S. 146, 148 (1940). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-545 (1978). The Secretary nevertheless fully complied with the court's order by issuing an expanded version of the hazard communication standard in the form of a final rule. See 52 Fed. Reg. 31,852 (1987). The Secretary's subsequent submission of the standard to OMB for PRA review did not violate any "clear command" of that order.

respondents then argue that the PRA is “instinct with the understanding that the sole subject covered by the [statute] is Federal agency directives to private parties to provide information to the agency for the agency’s use” (*id.* at 13, 24 (emphasis omitted)). In actual application, however, respondents’ reliance on this supposed “instinct” quickly breaks down.

For example, respondents concede that if an agency demands that persons gather information and send it to the agency, and the agency then disseminates this information to the public (presumably to achieve some “substantive end”), the agency has made an information collection request and the PRA applies. See Resp. Br. 30-33. But respondents contend that if, as here, the agency demands that the person gather information *and* disseminate it to the public *himself*—thereby imposing greater paperwork obligations on that person—the agency has not made an information collection request and OMB has no authority to review the agency’s action. See, e.g., *id.* at 13, 24, 27, 30. It thus appears respondents’ position turns not so much on the means/ends distinction, but rather on a formalism: whether the information is physically transmitted to the government.

Respondents fail to explain why Congress would have drawn this peculiar line or why, if Congress had intended such an odd distinction, it did not make its intention explicit. We submit that this Court should rely on the PRA’s language, rather than its “instinct.” That language indicates that Congress contemplated no such distinction. Respondents’ position produces confusing, counter-intuitive, and irrational results precisely because it has no moorings in the statutory text.

a. Respondents begin by declaring, under principles reminiscent of natural law, that “the logic of the process by which the Government elaborates the law generates a basic distinction between two classes of Government actions requiring private parties to prepare and disseminate

information” (Br. 18-19). The first class, respondents tell us, consists of information requirements that are “means to a further end,” while the second class comprises information requirements that are “the substantive end of the regulatory process in and of itself” (*id.* at 19 (emphasis omitted)). This grand dichotomy, however, is soon discarded. Respondents concede that agency information collection requests include both categories, and they acknowledge that there is actually a continuum of cases, which includes “the polar extremes in which the distinction is clear and borderline cases in which the distinction blurs” (*id.* at 19 n.12).<sup>3</sup>

Respondents’ “logical” premise and implementing classifications have doubtful utility as theoretical constructs; they appear to be little more than a post hoc justification for the court of appeals’ ruling.<sup>4</sup> In any event, they certainly are not a substitute for the statutory text. As the court of appeals recognized, the “sole question” here is whether the regulatory provisions at issue “involve either the ‘collection of information’ or an ‘information collection request’ within the meaning of the [PRA]” (Pet. App. 9a). Those terms, which Congress has defined to include “reporting or recordkeeping requirements” (44 U.S.C. 3502(4) and 3502(11) (1982 & Supp. V 1987)), aptly describe the Labor Department’s hazard communication standard. They *do not* distinguish between information

<sup>3</sup> For example, respondents concede that SEC-required information disclosures submitted to an agency “for the purpose of making it available to the public” (Br. 32) are covered by the PRA. In terms of respondent’s proposed dichotomy, however, these disclosures serve a “substantive end of the regulatory process.”

<sup>4</sup> Indeed, respondents’ classifications, which group the Department of Labor’s hazard disclosure requirements with automobile turn signals (Resp. Br. 19) but separate from the SEC’s financial disclosure requirements (*id.* at 30-33), are not self-evident and produce far more confusion than clarity.

collection requests that are a “means to a further end” and “the substantive end of the regulatory process in and of itself” (Resp. Br. 19). Respondents’ creation of a vague, artificial classification scheme (which respondents concede is really a continuum of distinguishable cases) is simply an attempt to engraft exceptions to the PRA’s definitions that are not present on the face of the statute.

Respondents give scant attention to the “definitions upon which petitioners place such reliance” (Br. 27). They acknowledge that “the PRA goes quite far in empowering OMB to review \* \* \* directives to private parties to make information available to the Government for the Government’s use” (Br. 20), but they contend that “there is not a single indication that the PRA goes the next step and empowers OMB to review \* \* \* substantive directives to private parties to make information available to other private parties for the latter’s own use” (*id.* at 20-21). Congress, however, quite clearly manifested its intention that the PRA would cover both situations by declining to distinguish between them. In particular, Congress did not draw respondents’ distinction in defining a “collection of information” and an “information collection request.” The absence of a textual differentiation is powerful evidence that no such distinction was intended. Respondents have no answer to the PRA’s definitions. Indeed, their entire discussion of the PRA’s definition of “information collection request” is contained in a single sentence stating that the definition “sheds no further light on the subject” (Br. 30).<sup>5</sup>

<sup>5</sup> Respondents acknowledge (Br. 28) that the PRA’s definition of “collection of information” (44 U.S.C. 3502(4)) includes “the obtaining or soliciting of facts or opinions by an agency through the use of \* \* \* reporting or recordkeeping requirements” (44 U.S.C. 3502(4)). Respondents urge, however, that the definition contemplates only

Respondents’ reliance on the statute’s “instinct” (Br. 13, 24) is an ornate admission that they can identify no provision of the PRA that expressly adopts their theory. It is also a tacit acknowledgement that the Court can reach the result that they seek only through implication. But respondents offer very little in support of that implication. The evidence they cite indicates, at most, that Congress was aware that demands for information submitted to an agency can impose substantial burdens. It certainly does not indicate that this was Congress’s *sole* concern.

Respondents place primary reliance on the PRA’s general statement of purposes. They point out (Br. 24-25) that the PRA states that one of its purposes is “to minimize the Federal paperwork burden” (44 U.S.C. 3501(1)), and that the statute later defines the word “burden” to mean “the time, effort, or financial resources expended by persons to provide information to a Federal agency” (44 U.S.C. 3502(3)). Respondents contend that those provisions demonstrate that the PRA is concerned only with

situations where the agency either “obtains or ‘endeavors to obtain’ facts or opinions” (Br. 28).

Respondents’ argument suffers from an obvious flaw: an agency does not itself “obtain” facts or opinions through the imposition of recordkeeping requirements. Congress plainly used the word “solicit” to include situations where an agency requires a person to collect information for the benefit of someone else. Indeed, that word is commonly used to describe agents who seek to obtain an object for another. See *Webster’s Third New International Dictionary* 2169 (1976) (citing, as an example of a solicitor, an agent who solicits contributions for charitable causes).

As we note in the text, respondents summarily reject the relevance of the PRA’s definition of the key term “information collection request.” They contend that “an ‘information collection request’ is simply a particular requirement ‘calling for the collection of information’ ” and therefore “sheds no further light on the subject” (Br. 30). Respondents have no answer to the fact that Congress has defined an “information collection request” in terms — such as reporting and recordkeeping requirements — that clearly describe the hazard communication standard.

agency requirements "to provide information to the agency for the agency's use" (Br. 24 (emphasis omitted)). That reasoning, however, is unconvincing.

As an initial matter, the federal government can and does "use" information in a variety of ways besides collecting and analyzing it. Information is also being "used" for governmental purposes when an agency requires persons to collect information and then disseminate it to the public. By the same token, although the PRA defines the term "burden" in terms of "provid[ing] information to a Federal agency" (44 U.S.C. 3502(3)), we do not believe that the definition, or the reach of the statute generally, hinges on the physical *transmission* of the information to the federal government. As the D.C. Circuit explained in a case involving the PRA's predecessor, the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.* (1976):

Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; it is the record keeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the establishment or maintenance of records . . . which are to be used or be available for use in the collection of information." \* \* \* Even under the deference we owe the agency, \* \* \* we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collection of information." Happily we confront no such oddity.

*Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, 1453-1454 (1988), petition for cert. pending, No. 88-849; see also Pet. App. 9a (acknowledging the *Action Alliance* decision); 5 C.F.R. 1320.7(b).

Respondents' reliance on the PRA's statement of purposes suffers from a deeper flaw. A general statement of purposes is just that—a declaration of motivating factors. Such statements do not override the Act's express, operative provisions. In this instance, the PRA's relevant operative provision states that OMB shall examine "information collection request[s]" to "determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility" (44 U.S.C. 3508). The only question here is whether the hazard communication standard contains such requests. We have shown that it does, and it is therefore subject to OMB's review.<sup>6</sup>

<sup>6</sup> Respondents also argue that the PRA's definition of the term "practical utility" supports their position. The PRA defines that term to mean "the ability of the agency to use information it collects" (44 U.S.C. 3502(16) (Supp. V 1987)). As we indicate in the text, an agency can put information "to use" (by requiring, for example, its dissemination) without actually receiving it. But in any event, practical utility is only *one* factor that OMB considers in determining whether the collection of information "is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). See generally 5 C.F.R. 1320.4(b), 1320.7(o). (In this brief, as in our opening brief, we cite OMB's regulations as they will appear in the 1989 Code of Federal Regulations. See 53 Fed. Reg. 16,618, 16,623 (1988); Gov't Br. Add. 9a-15a.)

Respondents' remaining inferential support is particularly unpersuasive. Respondents rely (Br. 21-22) on selected PRA passages that require agencies to eliminate "information collections which seek to obtain information available from another source within the Federal Government" (44 U.S.C. 3507(a)(1)(A)), and to reduce "the burden on persons who will provide information to the agency" (44 U.S.C. 3507(a)(1)(B)). They also note (Br. 25) that in the absence of an OMB control number, "no person shall be subject to any penalty for failing to maintain or provide information to any agency" (44 U.S.C. 3512). These provisions simply recognize the undisputed fact that agencies frequently require private parties to collect information and

Not only is the inferential support for respondents' proposed implied limitation on the scope of the PRA weak. Perhaps more importantly, their contention cannot be squared with the express terms of the relevant definitions at issue here. Respondents are unable to provide a reasonable explanation why, if "information collection request[s]" are implicitly limited to directives "to provide information to the agency for the agency's use" (Br. 13, 24 (emphasis omitted)), the statutory definition of "information collection request" explicitly *includes* "recordkeeping requirement[s]" (44 U.S.C. 3502(11) (1982 & Supp. V 1987)). Respondents' only answer is that Congress must have intended to limit the term "recordkeeping requirement" to records containing information "prepared for the Government's use" that must be provided to the government "upon request" (Br. 29 (emphasis omitted)). But Congress expressly defined the term "recordkeeping requirement" (44 U.S.C. 3502(17) (Supp. V 1987)), and it did not include that limitation. Thus, respondents require this Court to imply that *additional* limitation as well.<sup>7</sup>

Even if this additional proposed limitation were valid, the hazard communication standard's recordkeeping re-

submit it to the agency. The passages provide no basis for inferring that Congress intended that the PRA, as a whole, would apply *exclusively* to such requests. Respondents' reliance on the PRA's legislative history (Br. 25-27) is similarly flawed.

<sup>7</sup> Respondents mistakenly assert (Br. 29) that the PRA's legislative history supports their implication. The relevant passage, however, simply states:

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. The definition *includes* information maintained by persons which may be but is not necessarily provided to a Federal agency.

S. Rep. No. 930, 96th Cong., 2d Sess. 40 (1980) (emphasis added). This passage is not phrased in terms of a limitation, and it says nothing about exempting records that are not prepared for the government's use and not provided to the government upon request.

quirements would still qualify as information collection requests. The hazard communication standard specifically provides that an employer must make the relevant records (namely, written hazard communication programs and MSDSs) available, "upon request," to the Assistant Secretary of Labor. See 29 C.F.R. 1910.1200(e)(4) and (g)(11). Respondents apparently recognize this fact. Their solution to this problem is to suggest *yet another* implicit limitation. They argue that the "most natural meaning" of the term "record" is a document "to preserve evidence that some act or event occurred" (Br. 35 n.22). This definition, which excludes virtually all technical, scientific, financial and statistical records, appears to serve no purpose except to further respondents' immediate goal of exempting the relevant provisions of the hazard communication standard from PRA review. At bottom, respondents want this Court to rewrite the PRA to fit their theory. And as their extensive requests for redrafting show, once one begins to rewrite legislation, there is no logical stopping point.

b. Respondents have created their elaborate theory on the premise that the terms "information collection request" and "collection of information" "do[] not provide a direct answer to the question presented here" (Br. 27-28). We disagree with that premise. But as we explained in our opening brief (at 25), even if the PRA were silent or ambiguous with respect to the meaning of those terms, a court "does not simply impose its own construction on the statute" (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Instead, a court must give deference to OMB's reasonable interpretation of the PRA. See *id.* at 843-844. In this case, OMB's regulations implementing the PRA unambiguously affirm that the relevant provisions of the hazard communication standard are subject to PRA review. See Gov't Br. 5-8, 25-31.

As we have shown, OMB's longstanding construction is consistent with the express language of the PRA, and per-

haps for that reason respondents do not expressly challenge its reasonableness. See Resp. Br. 33-38. Instead, they contend that OMB's interpretation "is not entitled to any deference" (*id.* at 34) because the OMB regulations address "a subject *outside* the limits of the program Congress created in the PRA" and because "OMB is proposing an accommodation of policies that were *not* committed to the office's care by the PRA" (*id.* at 37). Respondents' argument rests on a basic misunderstanding of the *Chevron* doctrine and the PRA.

Respondents repeatedly contend (Br. 35, 36, 37, 38) that Congress has not given OMB the power to determine the scope of its own statutory authority. But that is not the issue. The question is whether OMB's expert interpretation of *provisions of a statute that it administers*—in this case, interpretation of the terms "information collection request" and "collection of information"—is entitled to deference. This Court's decisions leave no doubt that OMB's interpretations are entitled to judicial respect if they are reasonable. See, e.g., *Chevron*, 467 U.S. at 843-844 (and cases cited therein). An agency's construction of the statutory provisions it is charged with administering will almost always affect the scope of its regulatory authority and responsibilities. But that is the inevitable and expected consequence of interpreting regulatory statutes.

The *Chevron* doctrine's core principle of judicial deference to reasonable administrative interpretations is no less applicable because of that consequence. Indeed, *Chevron* itself demonstrates that fact. The precise regulatory question at issue in that case was the meaning of the Clean Air Act's statutory term "stationary source." The construction of that term directly determined the scope of the Environmental Protection Agency's responsibilities and authority in regulating new and modified stationary sources in "nonattainment areas." See *Chevron*, 467 U.S.

at 839-840. The Court nevertheless gave deference to the agency's interpretation. This case, far from being "qualitatively different" (Resp. Br. 36) from *Chevron*, is not meaningfully distinguishable.<sup>8</sup>

The cases that respondents cite do not question that an agency's regulatory interpretation is entitled to deference even though that interpretation may affect the scope of the agency's authority. They simply state the unremarkable principles that the courts have the final word on questions of statutory construction (e.g., *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 499 (1960); *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946)) and that unreasonable agency interpretations are not entitled to deference (e.g., *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986)).

Respondents are also mistaken in contending that Congress specifically withheld from OMB the authority to resolve, through regulatory interpretation, ambiguous provisions of the PRA. As this Court stated in *Chevron*, "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill

<sup>8</sup> See also, e.g., *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673-1674 (1989) (deference to the Secretary of Labor's determination that vacation pay is not an employee benefit welfare plan, which determines the scope of the agency's regulatory responsibilities under ERISA); *K mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988) (deference to the Customs Service's interpretation of the Tariff Act of 1930, which determines the scope of the agency's authority to exclude "greymarket" imports); *EEOC v. Commercial Office Products Co.*, 108 S. Ct. 1666, 1671 (1988) (deference to the EEOC's interpretation of Title VII, which determined the agency's authority to bring a civil rights enforcement action); *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987) (deference to the NLRB's interpretation of the NLRA, which determined the agency general counsel's authority to make post-complaint informal settlement decisions).

any gap left, implicitly or explicitly, by Congress.' " 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). In this instance, Congress expressly granted OMB that power by directing the agency to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter" (44 U.S.C. 3516). Moreover, the Senate Committee Report accompanying the legislation expressly observed that OMB would have authority to interpret whether particular agency actions constituted the collection of information. That Report states:

The "collection of information" definition does not change the scope of current authority and practice by the Director of OMB and the Comptroller General to promulgate rules and regulations needed to interpret the relationship of certain kinds of information to the definition of collection of information. This practice is presently evident in OMB Circular A-40 and GAO regulations (4 CFR Part 10). Previous editions of Circular A-40 and GAO regulations demonstrate how this authority has been used during the 37-year history of the original Federal Reports Act.

S. Rep. No. 930, 96th Cong., 2d Sess. 39 (1980); see also Gov't Br. Add. 16a-25a (setting forth the Bureau of the Budget's original Regulation A). Thus, there is no merit to respondents' contention that OMB lacks interpretative authority. And since OMB's regulatory interpretation in this case is reasonable, it is entitled to deference.

3. Respondents are also mistaken in contending (Br. 39-48) that OMB has "exceeded the explicit limits placed on the Office's authority by the PRA" (*id.* at 48). As we explained in our opening brief (at 31-37), the PRA expressly requires OMB to review information collection requests to "determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility." 44 U.S.C. 3508. See also 44 U.S.C. 3504(c). That is what OMB did in this case.

Respondents do not contend that OMB acted in excess of that statutory requirement. See, e.g., Public Citizen Br. in Opp. 7 ("OMB's basic objection to OSHA's decision to apply the revised [hazard communication standard] to multi-employer worksites was that it 'does not appear to be the least burdensome [way] necessary for the efficient transmittal of hazard information' ").<sup>9</sup>

Respondents nevertheless contend that *other* provisions of the PRA implicitly limit or repeal the statute's express command that OMB "determine whether the collection of information is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). That argument is unconvincing. This Court generally is reluctant to infer that Congress's enactment of one statute implicitly repeals another. *E.g.*, *Pittsburgh & L.E.R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2596 (1989); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The Court should be especially reluctant to conclude that Congress has enacted a statute that implicitly repeals or modifies its *own* text. See *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). As we explained in our opening brief, there is no reason to reach such a strange conclusion here.

a. Respondents base their argument, first, on Section 3504(a) of the PRA, which states that "[t]he authority of [OMB] under this section shall be exercised consistent with applicable law" (44 U.S.C. 3504(a) (1982 & Supp. V 1987)). They contend (Br. 43-46) that the Occupational

<sup>9</sup> Although respondents criticize OMB's actual decision in this case (Br. 46-47), they acknowledge that the only question before this Court is whether OMB has *authority* to review the hazard communication standard (*id.* at 18). See Gov't Br. I, 19 n.9. Since the court of appeals' exercise of jurisdiction in this contempt action was premised solely on that court's belief that OMB lacked authority to review the hazard communication standard (see p. 2, *supra*), the court did not examine the substance of OMB's determination.

Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, which requires the Secretary of Labor to set occupational safety and health standards, constitutes the "applicable law" in this case and that OMB review of the hazard communication standard would breach that law. Respondents' contention reflects a fundamental misunderstanding of the relationship between the PRA and other statutes.

The PRA states that OMB must review agency information collection requests to "determine whether the collection of information is *necessary for the proper performance of the functions of the agency*" (44 U.S.C. 3508 (emphasis added)). In this case, the OSH Act defines the agency's relevant functions. Section 6(b)(5) of the OSH Act requires the Secretary of Labor to set occupational safety and health standards that "most adequately assure[ ], to the extent feasible" that no employee will suffer material impairment (29 U.S.C. 655(b)(5)), and Section 6(b)(7) of the OSH Act requires that the Secretary also prescribe "the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised" of workplace hazards (29 U.S.C. 655(b)(7)). The question for OMB is whether the collection of information requirements that the Secretary of Labor has imposed in promulgating the hazard communication standard are, in fact, necessary to fulfill the OSH Act's requirements. Indeed, OMB's regulations are quite specific in limiting OMB's review in this manner. See 5 C.F.R. 1320.4(c)(1).<sup>10</sup>

<sup>10</sup> For example, OMB's regulations state that OMB will review whether an agency's information collection request is "the least burdensome necessary for the proper performance of the agency's functions *to comply with legal requirements* and achieve program objectives" (5 C.F.R. 1320.4(b)(1) (emphasis added)). See 5 C.F.R. 1320.4(c). Furthermore,

OMB will consider necessary any collection of information *specifically mandated by statute or court order*, but will in-

Since OMB bases its review on whether the agency's paperwork requirements are necessary for the agency to perform its statutory functions, there is no conflict between OMB review and the "applicable law." Instead, OMB review actually promotes the agency's ultimate objectives by assuring that it fulfills its statutory functions with a minimum of paperwork. There can be no conflict between OMB's review requirements and other "applicable law" unless that law requires the agency to collect information that it does *not* need to perform its functions. That situation is unlikely ever to arise. But in any event, it certainly is not the case here. Thus, OMB is not precluded by "applicable law" from conducting a PRA review of the hazard communication standard.

b. Respondents also contend that Section 3518(e) of the PRA precludes OMB from conducting its paperwork review in this case. That section simply states, however, that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, \* \* \* with respect to the substantive policies and programs of departments, agencies and offices" (44 U.S.C. 3518(e)). As we explained in our opening brief (at 33-34), this provision does not implicitly repeal OMB's obligation to "determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508); instead, it provides an explicit assurance that OMB's authority under the PRA extends only to review of information collection requests under the prescribed standard, and no further.

independently assess any collection of information to the extent that the agency exercises discretion in its implementation \* \* \*. 5 C.F.R. 1320.4(c)(1) (emphasis added).

Respondents' argument that Section 3518(e) repeals or modifies Section 3508's express standard of review suffers from a number of serious flaws. As an initial matter, respondents have themselves acknowledged that "[e]ntirely aside from OMB's responsibilities under the PRA, OMB has *sweeping authority* under Executive Orders 12,291 and 12,498 to supervise comprehensively the development of any regulatory action that imposes a paperwork requirement" (Public Citizen Br. in Opp. 4 (emphasis added)). Indeed, Public Citizen explains at some length that — apart from the PRA — OMB extensively reviews regulatory initiatives, including those involving information collection and dissemination, throughout all phases of the rulemaking process. *Id.* at 4-7. Thus, respondents concede that there is nothing novel about OMB's exercising oversight of agency regulatory activities.

Furthermore, Section 3518(e)'s reference to an agency's "substantive policies and programs" must obtain its meaning from the context in which the substance/procedure distinction is made. See *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2124 (1988). In the case of the PRA, the substance/procedure distinction draws a line between OMB's exercise of statutory duties under the PRA — including its express authority to review information collection requests — and the exercise of other statutory or policy oversight not related to paperwork. That distinction is not "tautolog[ical]" (Resp. Br. 40); it provides "interpret[ive]" guidance (44 U.S.C. 3518(e)) in determining whether OMB has any other authority under the PRA beyond that set forth expressly in the statute.

In this case, OMB simply seeks to comply with the PRA's *express* requirement that OMB review information collection requests. Respondents' reading of Section 3518(e) — which would make OMB's review authority turn

on whether OMB needs to make "substantive policy determinations" (Br. 41 (emphasis omitted)) — would result in an implicit repeal, in whole or in part, of Section 3508's express directive. Although respondents are willing to suggest how that judicial repealer should be written (*ibid.*), they are unable "to define the precise point at which 'paperwork management' becomes 'substantive decision[making]'" (*id.* at 42). Thus, the threshold question of OMB's authority to review information collection requests would henceforth be litigated separately in every case and would turn on an intractable inquiry into whether OMB will need to make "substantive" decisions. Certainly, Congress did not intend these bizarre and unproductive results.

4. Finally, respondents are noticeably silent on the practical justifications for their position. As we explain in our opening brief (at 35-37), OMB's centralized PRA review of agency initiatives, such as the hazard communication standard, promotes Congress's express objectives of minimizing the paperwork burden and maximizing the usefulness of government information collection activities. OMB's expert review not only relieves the public of unnecessary paperwork and reduces government duplications of effort, it improves agency decision-making and ultimately decreases the courts' burdens in reviewing potentially defective rules.

Respondents do not dispute that OMB's review of the hazard communication standard in this case will result in improved decision-making. OMB's review has led the Department of Labor to undertake further analysis and to solicit additional public comment. See 53 Fed. Reg. 29,822-29,856 (1988). Respondents repeatedly cite with approval (Br. 10-12, 45, 47 n.33) the Department of Labor's expanded articulation of its reasoning made in response to OMB's concerns. Indeed, even respondents are forced to acknowledge (*id.* at 11 n.8, 12 n.10) that the Department of Labor has proposed important modifications in light of OMB's concerns. Whatever its ultimate content, the revised

regulation will be a more thoroughly documented and better reasoned rule because of the PRA review process.

At bottom, respondents' only justification for prohibiting OMB from reviewing the hazard communication standard is a vague distrust of that agency. They suggest that allowing OMB to conduct the statutorily required paperwork review would result in allowing the "fox" to guard "the henhouse" (Br. 38). But that is not a legal argument.<sup>11</sup> Respondents' contention "runs contrary to the presumption to which administrative agencies are entitled—that they will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). See also *Fahey v. Mallonee*, 332 U.S. 245, 256 (1947). Respondents' suspicions do not provide a sufficient basis for overruling a legislative judgment.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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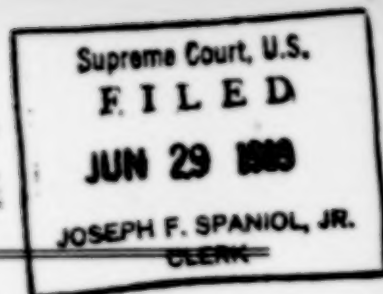
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SEPTEMBER 1989

<sup>11</sup> Nor is it even an apt metaphor—respondents' complaint is that OMB will be *too* vigilant in protecting the public from paperwork burdens.

\* The Solicitor General is disqualified in this case.

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No. 88-1434



In The  
**Supreme Court of the United States**  
October Term, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

**BRIEF OF THE BUSINESS COUNCIL  
ON THE REDUCTION OF PAPERWORK AS  
AMICUS CURIAE IN SUPPORT OF THE PETITIONER**

June 29, 1989

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**QUESTION PRESENTED**

Whether the Paperwork Reduction Act's review process applies to agency regulations, developed as part of the agency's statutory mission, that require regulated entities to collect information for disclosure to third parties?

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No. 88-1434

In The

Supreme Court of the United States  
October Term, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,  
*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

BRIEF OF THE BUSINESS COUNCIL  
ON THE REDUCTION OF PAPERWORK AS  
AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Business Council on the Reduction of Paperwork ("BCORP") respectfully submits this brief as amicus curiae in support of the petitions for writ of certiorari filed by the petitioner, Elizabeth Dole, Secretary of Labor. Pursuant to Supreme Court Rule 36.2, the parties have consented to the filing of this brief. BCORP has filed their written consents with the Clerk.

## INTEREST OF THE AMICUS CURIAE

The Business Council on the Reduction of Paperwork ("BCORP") is a non-profit, non-partisan association whose basic purpose is to assist the federal government, business entities and not-for-profit research institutions in maximizing the value and meaningfulness of federally generated data and records, while minimizing the burden of federally sponsored reporting and recordkeeping. BCORP's history dates to the 1942 enactment of the Federal Reports Act; it is the oldest organization devoted to this purpose.<sup>1</sup> BCORP's membership consists of twenty-eight national and regional trade associations and sixty individual business and educational organizations. Through its trade association members BCORP reaches out to thousands of other small and large enterprises to inform and involve them on issues addressing the burden and practical consequences of regulatory reporting and recordkeeping requirements. Many BCORP members are adversely affected by the Third Circuit's ruling in this case.

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<sup>1</sup> BCORP is the successor to the Advisory Committee on Government Questionnaires which was originally organized in 1942 at the request of the Director of the Bureau of the Budget in response to the enactment of the Federal Reports Act, ch. 811, 56 Stat. 1078 (1942). The Advisory Committee was later renamed the Advisory Council on Federal Reports ("ACFR"), and following the enactment of the Federal Advisory Committee Act in 1972 (86 Stat. 770), 5 U.S.C.A., Appendix 2 § 1 *et seq.* (1967), which terminated the existence of numerous federal advisory committees (such as ACFR) whose charters were not expressly renewed, ACFR reorganized as the Business Advisory Council on Federal Reports ("BACFR"). BACFR's stated

(Continued on following page)

BCORP's interest in the present dispute is more than academic. This is a case of enormous economic significance, not only to BCORP's membership, but to the commercial and research sectors of our economy and the public generally. The rule of law established by this case threatens to exempt from OMB review under the Paperwork Reduction Act of 1980 ("PRA") many unnecessary, federally mandated recordkeeping requirements with the effect of disrupting the Congressional goal of reducing paperwork burden. The court of appeals ruling lays open to challenge all OMB decisions under the PRA when those OMB decisions are based and articulated solely in terms of reducing paperwork burden. The ruling in this case will curtail, by judicial fiat, the congressional objective of reducing the burden of federally mandated recordkeeping and reporting by eliminating OMB clearance of agency rules and thus imposing costs on BCORP's members and the nation's businesses that might have been avoided as Congress intended.

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(Continued from previous page)

purpose was to advise the Director of the Office of Management & Budget ("OMB") and the Comptroller General of the United States, consistent with their respective statutory responsibilities under the Federal Reports Act, in coordinating the information - collecting services of the federal agencies with a view to minimizing the burden upon business enterprises, reducing the cost of government, and improving the quality of federally sponsored data collection and recordkeeping programs. In 1986, the association's name was changed to BCORP to reflect the national mandate established by Congress to bring about the *reduction* of unnecessary paperwork. BCORP is now the single private organization devoted exclusively to this purpose.

In enacting the Federal Reports Act and the PRA, Congress recognized that the federal government should, as a national objective, require efficiency in the collection, maintenance, and dissemination of information when it was required by the federal government. 44 U.S.C. § 3501. The PRA itself set an immediate objective of *reducing* the existing burden of Federal collection of information by twenty-five percent within three years. 44 U.S.C. § 3505(1). The need for this legislation was a response to the finding of the Federal Paperwork Commission which estimated in 1977 that the cost of Federal Paperwork requirements then amounted to \$100 billion a year, about \$500.00 for every man, woman and child. S. Rep. 930, 96th Cong., 2d Sess. 3 (1980). The Paperwork Reduction Reauthorization Act of 1986 set a further goal of reducing the burden of Federal collections of information by at least 5 percent in each of fiscal years 1987, 1988 and 1989. 44 U.S.C. § 3505(4).

In its most recent report to the President, OMB estimated that the public will spend over 1.7 billion hours in fiscal year 1989 complying with federal information collection requests.<sup>2</sup> Sixty-three percent of the burden falls

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<sup>2</sup> Office of Management and Budget, *INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT 1* (April 14, 1989) (hereinafter "1989 Information Collection Budget"). The figure may actually be much higher. The I.R.S. recently released a report stating that the taxpayer paperwork burden alone was 5.3 billion hours. A.D. LITTLE & CO., *STUDY FOR THE INTERNAL REVENUE SERVICE ON TAXPAYER PAPERWORK BURDEN* (August 31, 1988).

on business and other institutions.<sup>3</sup> In the same report, OMB reported that in every year but fiscal year 1987 OMB has actually been able to reduce paperwork burden: from 1981-1988 OMB was able to reduce that burden by over 500 million hours pursuant to its authority under the PRA.<sup>4</sup>

BCORP has another interest in this suit. One of the fundamental improvements which the PRA, 44 U.S.C. § 3501 *et seq.*, made to the old Federal Reports Act was the public participation provisions now codified in §§ 3507(a), 3508 and 3517 of Title 44 of the U.S. Code whereby the Director of the OMB must give interested agencies and persons a "meaningful opportunity to comment" before determining whether the "collection of information" by an agency is "necessary for the proper performance of the functions of the agency." As noted by the Senate Governmental Affairs Committee in the Senate Report accompanying S. 1411, which became the PRA, BCORP's predecessor-in-name:

The Business Advisory Council on Federal Reports (BACFR) has monitored the operations of the Federal Reports Act throughout the Act's history. The Council stressed to the Committee the value of increased public awareness and participation. As a result of their comments on S. 1411, the Committee has taken additional steps to provide a meaningful opportunity for public involvement.

S. Rep. No. 930, 96th Cong., 2d Sess. 16 (1980). In this case, BCORP petitioned OMB to hold hearings on OSHA's Hazard Communication Standard ("HCS") to hear the

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<sup>3</sup> 1989 Information Collection Budget, *id.* at 20.

<sup>4</sup> *Id.* at 4.

views of the public on this significant new federal recordkeeping requirement, and OMB held hearings. BCORP, some of its members, OSHA, and other interested parties participated in those hearings and shared their views on the paperwork burden issue posed by the HCS as well as the Revised HCS when it was extended to the non-manufacturing sector. In granting the motion of the United Steelworkers of America and Public Citizen, Inc. from which the present dispute arises, the Third Circuit effectively ruled that public hearings on the paperwork burden posed by the recordkeeping requirements of the Revised HCS should never have been held at all. This result undermines the nation's effort to involve both the public and the agencies in the paperwork reduction process so that all interested parties can evaluate the need for information and the cost attributable to collecting, maintaining and disseminating it. OSHA's Revised HCS is the fourth most burdensome information collection requirement imposed by the federal government; it is exceeded only by the individual income tax return and Department of Defense procurement requirements. The Revised HCS alone is responsible for 3.1% of the total federal paperwork burden.<sup>5</sup>

BCORP submits this brief on behalf of all of its members as *amicus curiae* in support of the Petitioner.

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### SUMMARY

This case involves disclosure-oriented recordkeeping requirements imposed by OSHA's Revised Hazard Com-

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<sup>5</sup> *Id.* at 23.

munication Standard, 29 C.F.R. § 1910.1200 (1989). They are "disclosure-oriented" because the regulation requires that the records (in this case health and safety data on hazardous chemicals in the workplace) be maintained primarily for the benefit of a segment of the public (employees) to whom the data is disclosed by or made available by employers. The records also have to be maintained for OSHA as well, 29 U.S.C. § 657(c)(1), but they do not necessarily have to be sent to or provided to OSHA or any other federal agency.

The Question Presented for review is a question that was asked and answered affirmatively by the Congress in enacting The Paperwork Reduction Act of 1980, and subsequently by OMB in promulgating rules thereunder. The issue of whether the Paperwork Reduction Act's review process extends to agency regulations that require regulated entities to collect information for disclosure to third parties was debated in the hearings leading to the enactment of the PRA. The legislative decision to extend the PRA review process to such disclosure-oriented regulations is reflected in the broad definition of "information collection request," 44 U.S.C. § 3502(11) which includes "reporting or recordkeeping requirements," and it is further reflected in the statutory pattern as a whole. The OMB, pursuant to a legislative delegation of authority under 44 U.S.C. § 3516, has promulgated rules necessary to exercise its authority provided by the PRA which are entirely consistent with the legislative design to include disclosure-oriented regulations within the PRA review process. 5 C.F.R. § 1320, *et seq.*

This case is to be decided by statutory construction. Your *amicus curiae* starts from the proposition that:

In ascertaining the plain meaning of a statute, the court must look to *the particular statutory language at issue, as well as the language and design of the statute as a whole*. [citations omitted] If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency regulation is a permissible construction of the statute. [citations omitted] If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.

*K mart Corp. v. Cartier, Inc.*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 1811, 1817 (1988) (emphasis supplied). The Third Circuit's construction of the PRA and its holding in this case cannot be sustained under this analysis, and therefore the decision of the court of appeals below must be reversed.

## ARGUMENT

### I. In Enacting The Paperwork Reduction Act Of 1980, Congress Intended To Bring Disclosure-Oriented Recordkeeping Requirements Within the Scope Of The Act's Review Process

The enactment of the PRA arose out of a conviction that the old Federal Reports Act, ch. 811, 56 Stat. 1078 (1942), needed to be "strengthened." A six year congressional inquiry led to this conviction. In 1974, Congress established the Commission on Federal Paperwork. See Act of December 27, 1974, Pub. L. No. 93-556, 88 Stat. 1789 (1974). In part, the Commission was established

because of congressional concern that a portion of the federal paperwork burden imposed by federal reporting requirements was "not covered by the [Federal Reports] Act." S. Rep. No. 1323, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 6661, 6664. In one of its reports to Congress the Commission noted:

"The Act is not clear on its coverage of a major portion of the paperwork burden - recordkeeping requirements - although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines . . . Not all agencies covered by the Federal Reports Act comply fully with its requirements.

For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws. There were negotiations and discussions from time to time between the OMB and the agencies concerned, not always with clear-cut resolution. Generally, the OMB was not inclined to make a head-on confrontation, nor did it have any specified statutory means to enforce compliance.

Commission on Federal Paperwork, The Reports Clearance Process 1 and 43 (Sept. 9, 1977).

During hearings before the Senate Government Affairs Committee in 1979, the Comptroller General

pressed his views that these disclosure-oriented recordkeeping requirements should be subject to the federal reports clearance process. See *Paperwork and Redtape Reduction Act of 1979, Hearing before the Subcommittee on Federal Spending Practices and Open Government, Senate Committee on Governmental Affairs, 96th Cong., 1st Sess. 123-124 (1979) (Letter of Elmer B. Staats to Abraham Ribicoff dated Oct. 31, 1979)*. In response to this view, the term "recordkeeping" was proposed to be included in the definition of the term "collection of information" in S. 1411 introduced by Senator Lawton Chiles in 1979. *Id.* at 94-95. "Recordkeeping" was not specifically included in the Federal Reports Act definition of this term. SEC Commissioner Evans urged the Senate Subcommittee to resist including disclosure-oriented recordkeeping requirements within the definition of "collection of information," and recommended that the term be limited to "collection for statistical purposes." *Id.* at 66-67 (Testimony of Commissioner John R. Evans). The Senate Bill did not accommodate Commissioner Evans' view.

In the following session of Congress, a House companion bill to S. 1411 was introduced, H.R. 6410, which contained the same proposed definition, and specifically defined the phrase "recordkeeping requirement" to include a requirement "to maintain specified records." *Paperwork Reduction Act of 1980, Hearings Before a Subcommittee of the House Committee on Government Operations, 96th Cong., 2nd Sess. 6 (1980)*. Testifying before the House Subcommittee, the Comptroller General noted that the House bill embraced the recommendations to resolve the problems which he and the Paperwork Commission

had previously identified with the reports clearance process:

Section 101 of the bill replaces the Federal Reports Act, incorporating five needed changes. First, recordkeeping requirements are specifically included in the reports clearance process . . .

The Federal Reports Act is presently unclear on whether recordkeeping requirements are subject to clearance. In practice, both GAO and OMB have required that they be cleared. Some agencies, however, have resisted compliance with these efforts.

Second, the act's definition of "information" is clarified to eliminate the ambiguity. For example, the Securities and Exchange Commission has interpreted the act to apply only to situations where the answers provided by respondents are to be used for statistical compilations of general public interest. This interpretation severely limits the coverage of the act and the controls over Federal information collection efforts.

*Id.* at 39-40 (Testimony of Elmer B. Staats).

When the hearings were completed and the bills were presented for passage, one "feature of the [PRA] which strengthen[ed]" and "clarified" the Federal Reports Act was specifically to include "recordkeeping requirements" in the definition of "collection of information." S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). Specifically, the Senate Report stated:

Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by

persons making investment and other financial decisions. In this connection, Federally-mandated *disclosures to the public* by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, information either to carry out its regulatory or other functions *or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.*

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. *The definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency.*

*Id.* at 39-40.

The House Report accompanying H.R. 6410 contained a similar discussion:

. . . the definition of "collection of information" clarifies an ambiguity as to the types of information collection covered by the Act. The Comptroller General testified that certain interpretations, such as that by the Securities and Exchange Commission, severely limit the scope of the act and the controls over Federal information collection efforts.

\* \* \*

The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements. The Committee fully expects SEC to comply with the "more extensive" definition of collection of information contained in H.R. 6410.

H. Rep. No. 835, 96th Cong., 2d Sess. 19 and 23 (1980).

These views were reiterated by Senator Chiles, the PRA's principal sponsor, when Congress considered amendments to the PRA in 1984. He explained:

[t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43 (1984).

In 1986, Congress enacted amendments to the PRA supplementing and clarifying the Act. Paperwork Reduction Reauthorization Act of 1986, Pub. L. 99-591, 100 Stat. 3341-335 (1986). Consistent with all of the foregoing, 44 U.S.C. § 3501(5) was amended in part to read (amendment italicized):

#### § 3501. Purpose

The purpose of this chapter is -

(5) to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, improves the quality of decisionmaking, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to *and for* the Federal Government; and

\* \* \*

While this subsection is not directly at issue here, this amendment underscores the spirit of the PRA that its scope extends to federally-sponsored information requests, including requests that require private persons

to disclose information "for" the federal government to the public.

**II. OMB's Regulations Are A Permissible Construction Of Its Authority Under The PRA To Review Disclosure-Oriented Recordkeeping Requirements Developed As Part Of An Agency's Function And Mission**

OMB, through its Office of Information and Regulatory Affairs (OIRA), is charged with the responsibility of administering the PRA. 44 U.S.C. § 3503. Additionally, each federal agency is responsible for "complying with the information policies, principles, standards, and guidelines prescribed by the Director" of OIRA. 44 U.S.C. § 3506(a). The Director of OMB is granted express authority to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. § 3516.

An "information collection request" is defined broadly to include not only report forms and questionnaires but a "collection of information requirement or similar method calling for the collection of information." 44 U.S.C. § 3502(11). The "collection of information" is likewise defined broadly to include "the obtaining or soliciting of facts \* \* \* through the use of \* \* \* identical recordkeeping requirements imposed on ten or more persons \* \* \*" 44 U.S.C. § 3502(4). A "recordkeeping requirement" is a "requirement imposed by an agency on persons to *maintain* specified records." 44 U.S.C. § 3502(17).

OMB's own regulations implementing the PRA, 5 C.F.R. § 1320, are consistent with the clear reading of the

PRA and with the legislative history. As the Senate Report commented, "Information *maintained*, as opposed to directly provided by Federal agencies, is therefore subject to the clearance requirements for collections of information set forth in Section 3507." S. Rep. No. 930, 96th Cong., 2d Sess. 38 (1980). Furthermore, both the Senate Report and the House Report confirm that "information is also collected to form the basis for *disclosure to the public*." Thus OMB relies on sound legislative authority when it explains that the "obtaining or soliciting of information" by an agency "includes any requirement or request for persons to *obtain, maintain, retain, report or publicly disclose information*." 5 C.F.R. § 1320.7(c) (emphasis supplied). "Requirements by an agency for a person to obtain for the purpose of disclosure to members of the public through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency." 5 C.F.R. § 1320.7(c)(2). This rule is entirely consistent with the purpose of the PRA "to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information," 44 U.S.C. § 3501(2), insofar as OMB has determined that the collection, maintenance, and dissemination of information is more efficiently handled by private persons instead of the Government itself.

### III. The Decision Of The Third Circuit Improperly Imposes Its Own Construction On The PRA

This case came before the Third Circuit in an unusual posture. Previously, the Third Circuit had ordered OSHA to revise its Hazard Communications Standard ("HCS") so that it extended to the non-manufacturing sectors of the economy. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3rd Cir. 1987) ("USWA II"). On August 24, 1987, OSHA published its Revised HCS, not only extending the rule to the non-manufacturing sectors, but also including three new provisions not contained in the original HCS. 52 Fed. Reg. 31852 (Aug. 24, 1987) In compliance with its duty under 44 U.S.C. 3507(a)(3) that "an agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request . . . , the Director has approved the proposed information collection request . . . ," OSHA submitted the Revised HCS to OMB on September 10, 1987. 52 Fed. Reg. 36652 (Sept. 10, 1987). OMB disapproved of the three new provisions of the Revised HCS on grounds of burden and duplication, and suggested less burdensome alternatives to OSHA.

On April 6, 1988, the Respondents moved the court of appeals to hold the Secretary of Labor in contempt of the Third Circuit's prior order in *USWA II* for submitting the Revised HCS to OMB, and for further relief pursuant to the All Writs Act. 28 U.S.C. § 1651(a). The Third Circuit expressly avoided the contempt issue, *USWA III*, 855 F.2d at 114, and held that "the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority." *Id.* The Secretary of Labor was not held in contempt. This case therefore squarely addresses the authority of OMB to review a revised disclosure-oriented recordkeeping requirement under the PRA.

The court of appeals held:

Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either: (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

*USWA III*, 855 F.2d at 112.

OMB disapproved of only three aspects of the Revised HCS. First OMB disapproved of the requirement that employers at multi-employer worksites maintain and exchange among themselves (or maintain at a central depository) the Material Safety Data Sheets (MSDS) on hazardous chemicals. The MSDS required by the HCS to be maintained by all employers is clearly the obtaining of facts through the use of a recordkeeping requirement to maintain specified records. As the underlying OSHA regulation requires:

(8) The employer shall *maintain* copies of the required material safety data sheets for each hazardous chemical in the work place, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Emphasis supplied).

29 C.F.R. § 1910.1200(g)(8):<sup>6</sup> The Third Circuit concluded

<sup>6</sup> The rule applicable to multi-employer worksites, 29 C.F.R. § 1910.1200(e)(2)(i) likewise contemplates that employers will maintain MSDS's at their own offices or at a central location in the workplace.

that the OSHA regulation at issue<sup>7</sup> did not require the employer to "compile" information but merely to transmit it or disclose it to employees. The PRA is not so narrow and it regulates agency rules which require persons to maintain information for disclosure to members of the public or the public-at-large. The Third Circuit not only ignored the legislative history of the PRA, but it totally ignored OMB's own PRA implementing regulation which states:

Requirements by an agency for a person [employer] to obtain [an MSDS from a chemical manufacturer] for the purpose of disclosure to members of the public [employees] through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency. 5 C.F.R. § 1320.7(c)(2)

Secondly, OMB effectively disapproved of the entire Revised HCS insofar as it failed to *expand* the exemptions for consumer products and FDA regulated drugs where there were pre-existing, duplicative disclosure requirements. The Third Circuit, overlooking the fact that it is the Revised HCS which calls for the "collection of information," mistakenly confused the issue and concluded that "exemptions from labelling requirements which would otherwise be duplicative" cannot be a "collection

<sup>7</sup> Specifically, the requirement that employers at multi-employer workplaces maintain or provide to other employers at the workplace a MSDS for each hazardous chemical. 29 C.F.R. § 1910.1200(e)(2).

of information." *USWA III* at 112. This mistake in perception led the court of appeals to hold that these two OMB disapprovals were improper as well. Since it is the Revised HCS (not the exemption) that constitutes an information collection request, OMB's recommendation of an *expanded exemption* from the information collection requirements of the Revised HCS to avoid duplication in these two instances is properly a "disapproval."

The Revised HCS was an "information collection request" and OMB had authority by statute to review it.<sup>8</sup> 44 U.S.C. § 3507(a)(3).

The Third Circuit pinned its holding on a second theory too. The court of appeals accused OMB of "second-guessing" OSHA's policymaking, and held that OMB was without authority to do so, citing 44 U.S.C. §§ 3504(a) and 3518(e). Again, the court of appeals failed to look to the particular statutory language and the design of the statute as a whole. The Third Circuit's exclusive reference to these provisions of the PRA selectively misinforms the role intended for OMB by Congress.<sup>9</sup>

<sup>8</sup> The Third Circuit's holding conflicts with the decision of the D.C. Circuit in *Action Alliance of Sr. Citizens of Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *cert. pending*, holding that a "collection of information" subject to OMB review need not be submitted to an agency.

<sup>9</sup> Sections 3504(a) and 3518(e) were two of three "safeguards" incorporated in the PRA to be sure there was no dilution in the independence of agencies. S. Rep. 930, 96th Cong., 2d Sess. 15 (1980). Section 3518(e) was simply a statement of belief that "the bill shall not affect in any way the

(Continued on following page)

Within the framework of the PRA, it is initially the responsibility of each federal agency to determine the agency's "need for the information" and estimate the burden that will result from the information collection request. 44 U.S.C. § 3507(a). OMB then fulfills its statutory mission to minimize the cost of collecting, maintaining and disseminating information, under the statutory grant of authority contained in 44 U.S.C. §§ 3504(a), 3504(c), 3507(a) and 3508 by reviewing an agency's "information collection requests"; in other words, reviewing whether an agency has met its statutory responsibilities under the PRA:

**§ 3504 Authority and functions of Director.**

(a) The Director shall develop and implement \* \* \* and oversee the review and approval of information collection requests, \* \* \* The authority of the Director under this section shall be exercised consistent with applicable law.

(c) The information collection request clearance and other paperwork control functions of the Director shall include -

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is *necessary for the proper performance of the functions of the agency*, including whether

(Continued from previous page)

existing authority of \* \* \* OMB with respect to the substantive policies and programs of departments and agencies." *Id.* In the words of the statute, OMB's authority was neither increased nor decreased, but OMB was clearly charged under § 3508 with the authority to determine whether an information collection request was necessary.

the information will have practical utility for the agency. (Emphasis supplied).

**§ 3507. Public information collection activities-Submission to Director; approval and delegation**

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information -

\* \* \*

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

**§ 3508. Determination of necessity for information; hearing**

Before approving a proposed collection request, the Director shall determine whether the collection of information by an agency is *necessary for the proper performance of the functions of the agency, including whether the information will have practical utility*. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is *unnecessary, for any reason, the agency may not engage in the collection of the information*. (Emphasis supplied).

The relationship between a federal agency and OMB under the PRA is also set out in 44 U.S.C. § 3518:

**§ 3518. Effect on existing laws and regulations**

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

\* \* \*

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

Under this statutory framework, Congress has clearly "subjected" the federal agencies to the power-vested in OMB and the Administrator of OIRA to determine whether a collection of information by an agency is "necessary for the proper performance of the functions of the agency." No other construction of Sections 3506(a), 3507(a), 3508 and 3518(a) is possible. The very language of § 3508 instructing OMB to "determine whether the collection of information is *necessary* for the *proper performance of the functions of the agency*" necessarily means that OMB will have to contemplate the agency's substantive role and functions in assessing whether the collection of information is "necessary." At a minimum, the very word "necessary" envisions that there will be some "second guessing" of an agency's action by OMB. Consequently, the mere fact that OSHA's policymaking in this case concerned the disclosure of information to workers does not remove a disclosure-oriented recordkeeping requirement from OMB's jurisdiction. Instead, it is merely one of the factors that OMB might consider in determining whether the collection of information is "necessary."<sup>10</sup>

<sup>10</sup> The Director of OIRA clearly perceives such a balancing act for her role. "While the Act's underlying goal is to mini-  
(Continued on following page)

The Senate Report confirms that it was ultimately the responsibility of the Director of OMB to determine an agency's need:

*Necessity is thus the test under this section. This determination is to include whether the collection of information: (1) has practical utility for the agency, (2) is not more than the minimum needed to meet the agency's objective, or (3) is not duplicative of similar information otherwise accessible. If the Director determines that a collection is not necessary, he should not approve it. The Director is authorized to give the agency and other interested persons an opportunity to be heard or to submit statements in writing before making a determination. Unless the collection of information is specifically required by statutory law the Director's determination is final for agencies which are not independent regulatory agencies.*

S. Rep. No. 930, 96th Cong., 2d Sess. 49 (1980).

Congress knew that it had given significant authority to the Director of OMB under the PRA and it saw itself as the ultimate overseer of the Director's conduct in determining necessity.

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mize the Federal Paperwork burden on the public, the [PRA] also recognizes the need to weigh the burdens of the collection on the public against the needs of the agency." *Paperwork Act Oversight: Internal Revenue Service Forms W-4 and W-4A, Hearing Before the Subcommittee on Federal Spending, Budget and Accounting, Senate Committee on Governmental Affairs, S. Hrg. 100-75, 100th Cong., 1st Sess. 30 (1987) (Statement of Wendy L. Gramm).* Similarly, the most recent OMB Information Collection Budget states: "The ICB process requires a balance between the burden of the public of supplying this information and the practical utility in furthering the goals of the Federal government." *1989 Information Collection Budget, supra* at 2.

The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

*Id.* at 16.

At the time it enacted the PRA, Congress was aware that in some cases there would be a "close relationship between policy making and information management." H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). However, the legislators felt that the agencies should be capable of justifying "their need for information used to establish policy or for other purposes." *Id.* As a practical matter, OMB demonstrated a certain solicitude for OSHA's needs in this case and suggested further rulemaking by OSHA on the HCS to justify its need for other portions of the HCS. This is hardly a case of "political interference" which concerned some members of Congress and prompted the enactment of the safeguards. It is a classic case of how the PRA was intended to work.

Succinctly, what the court of appeals did was to observe that one of OSHA's substantive functions included requiring employers to make disclosures to employees on health and safety issues. This fact alone, the court of appeals held, took OSHA's regulations enacted within the purview of this function outside of the PRA clearance process, leaving OMB without authority. This holding ignores "the particular statutory language at issue, as well as the language and design of the [PRA] as a whole." *K mart Corp. v. Cartier, Inc.*, *supra*. Just as

Congress would not exempt the SEC from OMB's clearance process, this Court should not exempt OSHA.

It cannot be ignored that the PRA was enacted for the protection of the public, and in centralizing the clearance process in OMB Congress deliberately modified the practice under the Federal Reports Act where some agencies were accountable to no one and review was otherwise divided between OMB and the General Accounting Office. Congress deliberately chose to hold one agency accountable to it for achieving the objectives of the PRA. No section of the Act is more revealing of this purpose than Section 3512.<sup>11</sup> Although not directly implicated by the facts in this case, the spirit and intent of Section 3512 is clearly offended by the Third Circuit's ruling. Enacted for the protection of the public, Section 3512 requires that an OMB control number be assigned to each information collection request. That control number is a symbol to the American public "indicating that the Director of OMB is the accountable individual in government to be sure that the information is *needed*, is *not duplicative* of information already collected, and is collected *efficiently*." S. Rep. No. 930, 96th Cong., 2d Sess. 9 (1980) (emphasis supplied). It is a symbol that the information collection request has been "subjected to the clearance process described by

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<sup>11</sup> § 3512. Public protection

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

Section 3507." *Id.* The Third Circuit's decision has deprived the public of the meaningfulness of the OMB control number (No. 1218-0072) assigned to the Revised HCS, because in this case the court of appeals has held that the clearance process should have never occurred.

The Third Circuit Court of Appeals improperly "impose[d] its own construction on the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

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### CONCLUSION

For these reasons, the decision of the court of appeals below should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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ELIZABETH DOLE, Secretary of Labor, *et al.*,  
v. *Petitioners*  
UNITED STEELWORKERS OF AMERICA, *et al.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit

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**BRIEF OF THE  
NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**BRIEF OF THE  
NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**INTEREST OF AMICUS CURIAE**

The National Wholesale Druggists' Association (NWDA) files this brief with the consent of the parties.

NWDA is an association of businesses engaged in the wholesale distribution of prescription and over-the-counter medicines and consumer products. Its membership includes drug wholesale companies operating drug distribution centers nationwide. Each distribution center has an average of 400 pharmacy customers, and distributes approximately 12,000 in-

dividual FDA-regulated drugs that appear to be subject to the Hazard Communication Standard (29 C.F.R. 1910.1200), implemented by the Occupational Safety & Health Administration (OSHA) of the Department of Labor.

NWDA's members are regulated under the OSHA standard through two particular provisions: 29 C.F.R. 1910.1200(b)(4), which discusses work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use, and 29 C.F.R. 1910.1200(g)(7), which describes the duty of distributors to ensure that Material Safety Data Sheets (MSDSs) and updated information are provided to other distributors and employers. Even when only sealed containers are handled, MSDSs that are received by the wholesaler must be maintained and must be made accessible to employees under paragraph (b)(4)(ii) of the standard.

Products of particular concern to NWDA members are drugs regulated by the Food & Drug Administration (FDA) under the Food, Drug, and Cosmetic Act, 21 U.S.C. 301, *et seq.* The employers to whom these drugs are distributed are hospital, retail, and nursing home pharmacies.

Although not a party in the Third Circuit litigation below (855 F.2d 108 (3d Cir. 1988)), NWDA has participated extensively in the administrative and hearing stages of the OSHA rulemaking, as well as in the review of that rulemaking by the Office of Management & Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* It was in part on the basis of NWDA's testimony at the public hearing of October 16, 1987, that OMB disapproved ap-

plication of the OSHA standard to FDA-regulated drugs (Petition for Certiorari, p. 37a).

#### STATEMENT OF FACTS

FDA-regulated drugs are subject to substantial warning information requirements in the form of product labeling under the Food, Drug, and Cosmetic Act, *supra*. Data about new drug products are reviewed by FDA scientists, including pharmacologists and toxicologists, to assure that each drug is safe and effective for the indicated use with the patient and for the administering professional pharmacist, physician, and nurse.

FDA-required labeling under 21 U.S.C. 321 includes separate written sheets called "professional package inserts" (21 C.F.R. 1.3), one of which must be in each package. This information provides details of the product chemistry and its hazards. In addition, information from product labels and professional package inserts is compiled and published verbatim in commonly available texts as the *Physicians' Desk Reference* (42d Edition, 1988, Medical Economics Co., Inc., Oradell, NJ 07649), *Facts and Comparisons* (Looseleaf Drug Information Service, J.B. Lippincott Co., St. Louis, MO 63146-3098), and *USP Dispensing Information* (9th Ed., 1989, United States Pharmacopeial Convention, Inc., Rockville, MD 20852).

FDA-regulated drugs are exempt from OSHA labeling under 29 C.F.R. 1910.1200(b)(5)(ii). In addition, the standard as expanded to include non-manufacturers offers a *complete* general exemption for "Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301,

*et seq.*), when it is in solid, final form for direct administration to the patient (i.e. tablets or pills)," 29 C.F.R. 1910.1200(b)(6)(viii). Due to the phrasing of this general exemption and its limitation to tablets and pills, the drug wholesaler remains obligated to maintain and to distribute MSDSs to pharmacies for FDA-regulated products in capsule, injection bottle, liquid, and other physical forms.

NWDA has estimated that *each* of its members' 310 distribution centers would have to retain 12,000 MSDSs and to pass on 4.8 million copies of those MSDSs (400 customers times 12,000 products). Based upon this burden, plus the present availability of detailed FDA-required chemical and hazard information in the form of professional package inserts and reference texts, and in light of the specialized knowledge of the professional employee audience, OMB disapproved the OSHA standard under the Paperwork Reduction Act as the standard applies to *all* FDA-regulated drugs. (OMB letter to Thomas Komarek, Oct. 28, 1987; Petition for Certiorari, Appendix E, p. 22a.) OMB found that "coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility." (*Id.*, p. 37a.)

#### SUMMARY OF ARGUMENT

The Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, is intended to minimize the Federal paperwork burden for individuals, small businesses and other persons. This statute vests the Director of OMB with certain specific review and approval functions with regard to recordkeeping, reporting, and paperwork required by federal agencies.

The OSHA hazard communication standard, as applied to FDA-regulated drugs, imposes an extremely burdensome and unnecessary paperwork redundancy through obligations upon FDA-drug wholesalers and pharmacists to obtain, distribute, retain, and update Material Safety Data Sheets for prescription medicines already covered by FDA paperwork requirements. Under OMB regulations, as well as the words of the Paperwork Reduction Act, burdens such as these are included in the information collection review process. OMB, in an appropriate hearing, found the general exemption for drugs offered in the OSHA standard to be inadequate because it was limited to pills and tablets and, therefore, OMB disapproved the standard as it would apply to any FDA-regulated drugs.

On Supreme Court review of the decision in *United Steelworkers, et al. v. Pendergrass, et al.*, 855 F.2d 108 (3d Cir. 1988), we ask the Court to find that the Third Circuit Court of Appeals erred—

- (1) in concluding that the Paperwork Reduction Act is inapplicable to the paperwork burdens imposed by the OSHA standard;
- (2) in ignoring the OMB regulations implementing the Paperwork Reduction Act, which explicitly declare this type of paperwork burden to be encompassed by the review process; and
- (3) in misinterpreting the intent and effect of the OMB action as it pertains to FDA-regulated drugs.

## ARGUMENT

### I. BY THE TERMS OF THE PAPERWORK REDUCTION ACT AND THE OMB REGULATIONS IMPLEMENTING IT, THE OSHA STANDARD AS APPLIED TO FDA-REGULATED DRUGS WAS SUBJECT TO OMB REVIEW AND DISAPPROVAL.

The first purpose of the Paperwork Reduction Act, *supra*, is "to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." 44 U.S.C. 3501(1). An additional purpose expressed in the statute is "to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices." 44 U.S.C. 3501(4)\*. One of the functions of the OMB Director is to "provide direction and oversee the review and approval of information collection requests" as well as "the reduction of the paperwork burden." 44 U.S.C. 3504(a). Section 3504(b), defining the Director's authority and functions, includes the responsibility to review government agencies' information collection proposals.

Section 3508 of the Paperwork Reduction Act states:

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether

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\* The interagency coordinating role for the OMB Director, defined in paragraph (4) of the purpose section of the Paperwork Reduction Act, is consistent with Section 4(b)(1) of the Occupational Safety & Health Act, 29 U.S.C. 653(b)(1), which declares that OSHA standards shall not apply "to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

the information will have practical utility. . . . To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

The Paperwork Reduction Act defines "collection of information" to include "the soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods. . . ." 44 U.S.C. 3502(4). The term "information collection request" is defined in subparagraph (11) of that section to mean "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information." Subparagraph (17) defines "recordkeeping requirement" as "a requirement imposed by an agency on persons to maintain specified records."

Under the OSHA hazard communication standard, NWDA's members are obligated to maintain MSDSs that are received and to keep them accessible for inspection by employees and by OSHA compliance officers. All MSDSs that are received, in addition, must be duplicated and distributed to all pharmacist customers. This federal obligation is a reporting, recordkeeping, and collection of information requirement.

OMB's rules generally note that a proposed collection of information will not be approved "requiring respondents to maintain or provide information in a format other than that in which the information is customarily maintained." 5 C.F.R. 1320.6(j).

Chemical information about FDA-regulated drugs is customarily maintained in FDA-required labeling, including printed professional package inserts. It is *not* customarily maintained by the non-manufacturing wholesaler or pharmacy on MSDS forms. Examples of such package inserts as well as the detailed FDA-required information reproduced in texts such as the *Physicians' Desk Reference*, *Facts and Comparisons*, and *USP Dispensing Information*, *supra*, were included in Appendices to the NWDA Testimony Before the Federal Office of Management & Budget, October 16, 1987, which is part of the OMB administrative record. The insert goes into or is affixed to each package, and wholesalers, pharmacists and other people who use this information regularly maintain copies of the bound texts. Through this existing FDA system, effective hazard communication involving labeling, paperwork and training is in place. The information found on a typical MSDS is much less specific, and less effective as a communication to a pharmacist whose training is based upon the style of FDA labeling and professional package insert information. The data in a professional package insert differs somewhat in format from an OSHA MSDS, but it conveys essentially the same information. This different format carries the benefit of being more familiar to the specific audience for which it has been prepared—the same audience of distribution, pharmacy and medical employees as that targeted by the OSHA hazard communication standard.

Section 3516 of 44 U.S.C. mandates that the OMB Director “promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter.” Section 1320.7(c) of OMB’s regulations defines the “collection of information” as the obtaining or soliciting of information, and goes on to define

such solicitation as including “any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.” Subparagraph (c) (2) says:

Requirements by an agency or a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the “collection of information” whenever the same requirement to obtain or compile information would be a “collection of information” if the information were directly provided to the agency. . . .

This definition section also states explicitly that “[r]ecordkeeping requirement” . . . includes requirements that information be maintained or retained by persons *but not necessarily provided to an agency*” (5 C.F.R. 1320.7(r)), and that “[r]eporting requirement” means a requirement imposed by an agency on persons *to provide information to another person or to the agency*” (5 C.F.R. 1320.7(s)) (Emphasis supplied.)

Typical MSDSs fill several pages. Using NWDA’s estimates drawn from its own membership, each distribution center services an average of 400 customers with a universe of 12,000 affected products that would require MSDSs. (Approximately 4,000 drug wholesalers operate in the U.S., not all of whom are represented by NWDA, but all of whom are facing this crisis.) If each MSDS were 4 pages long, each NWDA member’s distribution center would have to duplicate and distribute an average of 19.2 million sheets of paper to customers who already have virtually the same information in a different format in their *Physicians' Desk Reference*, *Facts*

and Comparisons, or USP Dispensing Information, *supra*.

This is exactly the type of duplicative and useless burden the Paperwork Reduction Act was designed to curtail. That MSDSs for each product need not be filed directly with OSHA is irrelevant—they are required of all employers by a government agency in a specific format with specific entries as records to be obtained, retained, distributed and updated. This paperwork also must be available for inspection by employees and government compliance officers. The Congressional concern addressed by the Paperwork Reduction Act was the burden on the people who are required to complete federal paperwork. The identity or address of the recipient in no way lessens the burden suffered by any business needlessly compelled to copy and distribute millions of sheets of paper that substantially repeat what is already on every recipient's shelf.

## II. THE THIRD CIRCUIT'S REFUSAL TO ACKNOWLEDGE THE OMB REGULATIONS IS REVERSIBLE ERROR.

The OMB regulations in 5 C.F.R. Part 1320 implementing the Paperwork Reduction Act unquestionably describe the paperwork burden imposed upon NWDA's members and others by the expanded OSHA standard. However, in holding that the OSHA standard does not involve "collection of information" under the Paperwork Reduction Act, the Third Circuit did not even acknowledge the existence of these rules despite the fact that the rules were discussed extensively in the government's brief to that court.

This is inexplicable. It is well established that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." *E.I. duPont*

*de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). This Court has stated:

"We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum v. Bacon*, 457 U.S. 132, 141 (1982). "To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' . . . We need only conclude that it is a reasonable interpretation of the relevant provisions." *American Paper Institute, Inc. v. American Electric Service Corp.*, 461 U.S. 402, 422-423 (1983), quoting *Unemployment Compensation Comm'n v. Aragan*, 329 U.S. 143, 153 (1946).

*Aluminum Co. v. Central Lincoln People's Utility District*, 467 U.S. 386, 389 (1984). *Accord, Udall v. Tallman*, 380 U.S. 1, 16 (1965) (deference is particularly due to an administrative interpretation involving "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion").

Moreover, the deference owed the agency's interpretation takes on particular significance when that interpretation is embodied in legislative-type regulations promulgated pursuant to a grant of authority such as that found in 44 U.S.C. 3516. Agency legislative regulations implementing its enabling legislation have the force and effect of law and are entitled to great weight. Unless the regulation embodies a construction of the statute "contrary to clear congressional intent," a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of

an agency." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). See also, *United States v. Morton*, 467 U.S. 822, 834 (1984) ("[b]ecause Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulators legislative and hence controlling weight unless they are arbitrary, capricious or plainly contrary to the statute"); accord, *Batterton v. Francis*, 432 U.S. 416, 424-426 (1977).

Here, the OMB regulations are plainly consistent with Congress' intent. The Senate Report on the Paperwork Reduction Act expressly states that the definition of "recordkeeping requirement" as found in that Act "includes information maintained by persons which may be but is not necessarily provided to a Federal agency." S. Rep. No. 96-930, 96th Cong., 2d Sess. 40, *Reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6280. Moreover, in considering amendments to the Act in 1984, Congress was aware of OMB's construction of the Act found in its regulations, and took no steps to alter that construction. See, S. Rep. No. 98-576, 98th Cong., 2d Sess. (1984). "[C]ongressional failure to revise or repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986), quoting *NLRB v. Bell Aerospace, Inc.*, 416 U.S. 267, 275 (1974). Accord, *Red Lion Broadcasting, supra*, 395 U.S. at 381-382.

Thus, the Third Circuit committed manifest error in refusing to acknowledge, much less discuss and analyze, OMB's regulations implementing the Paperwork Reduction Act that are clearly on point.

### III. THE THIRD CIRCUIT OPINION ERRONEOUSLY CONFUSED THE EFFECT AND IMPORT OF THE OMB ACTION WITH REGARD TO OSHA'S GENERAL EXEMPTION OF FDA-REGULATED DRUGS.

It is important to note the Court of Appeals' apparent misunderstanding of the action taken by OMB with regard to FDA-regulated drugs. Although a *labeling* exemption has existed and was continued in the OSHA standard for consumer products and FDA-regulated drugs, a new *general* exemption was created, but only for 'a limited number of consumer products and FDA-regulated pills and tablets. OMB's disapproval did not criticize the new general exemptions because they were unwarranted, as the Third Circuit implies, but because they did not go far enough. OMB found that MSDS requirements on FDA-regulated drugs are grossly burdensome for distributors and pharmacists, duplicative of existing paperwork, and of little utility to anyone. The Third Circuit, however, appears to have confused the labeling and general types of exemption, and seriously misstated the OMB position:

Whatever else the terms "collection of information" or "information collection requests" may refer to, they cannot possibly refer to these exemptions from labeling requirements imposed in the interest of health and safety by other federal regulatory agencies.

55 F.2d 108, 112.

As a result of the confusion, the court passed over the FDA issue and devoted the bulk of its opinion only to the substantially different multi-employer worksite issue. The court closed its opinion by declaring the general exemptions to be a "logical outgrowth" of the original administrative record, but

again appeared to misconstrue OMB's disapproval as destroying those exemptions rather than being a finding of insufficient breadth. OMB declared the standard unenforceable with regard to *all* FDA-regulated drugs. The standard may have been expanded pursuant to court order but, as noted in 5 C.F.R. 1320.4(c)(1), the Director "will independently assess any collection of information to the extent that the agency exercises discretion in its implementation." The creation of general exemptions was a "logical outgrowth" of the record within OSHA's discretion and was appropriate for OMB review.

#### CONCLUSION

For the foregoing reasons, the Third Circuit decision with regard to the OMB disapproval under the Paperwork Reduction Act of any OSHA coverage of FDA-regulated drugs should be reversed.

Respectfully submitted,

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(11)  
No. 88-1434



IN THE  
**Supreme Court of the United States**  
October Term, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*  
*Respondents.*

ON PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF LAWTON CHILES AS *AMICUS CURIAE*

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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1988**

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No. 88-1434  
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Elizabeth Dole, Secretary of Labor, *et al.*,

*Petitioners,*

v.

United Steelworkers of America, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT  
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**BRIEF OF LAWTON CHILES AS AMICUS CURIAE  
IN SUPPORT OF THE PETITIONERS**  
-----

## INTEREST OF THE AMICUS CURIAE

As a member of the United States Senate, Amicus Lawton Chiles was the Senate sponsor and an author of the Paperwork Reduction Act of 1980 (PRA), as well as the Senate sponsor of amendments to the Act contained in the Paperwork Reduction Reauthorization Act of 1986.

As the principal architect of the PRA, I have a particular interest in the proper interpretation of that law by the courts. In that regard, I submit that the Third Circuit fundamentally misread the Act, and misconstrued its statutory scheme when it held that

any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either, (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

*United Steelworkers of America v. Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988).

I respectfully disagree with this holding of the lower court. Unless overturned by this Court, important means established by Congress to achieve the fundamental public - purposes of the Paperwork Reduction Act will be eviscerated and rendered meaningless.

Amicus will principally focus on the legislative history of the PRA because of his unique perspective as sponsor of the law which is being interpreted. As this

Court said in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951), "It is the sponsors that we look to when the meaning of the statutory words is in doubt."

## SUMMARY OF ARGUMENT

1. The Third Circuit opinion ignores the language of the statute and applicable legislative history. The Senate and the House of Representatives explicitly considered whether collection and maintenance of information for disclosure by one private party to another (or to the public as a whole) required by regulation should be subject to the Act, and decided that it should.

2. In focusing on 44 U.S.C. §§ 3504(a) and 3518(e), the Third Circuit ignored the design of the statute as a whole. The Third Circuit's alternative holding that "any rulemaking activity" by an agency falls outside the final review authority of the Director of OMB if it "embodies substantive policy decision making entrusted to the other agency" renders the Act meaningless. Federal agencies assert, and will continue to assert, that every rulemaking activity embodies substantive policy decisions entrusted to them. If the converse were so, they would have no basis to issue a rule. Congress did not intend that rulemaking activities involving information collection requests be insulated from either the Director of OMB's review required by Sections 3507 and 3508, the public notice and participation requirements of Section 3507, or the public protection provision afforded by Section 3512 of the Act.

## ARGUMENT

### I. THE LOWER COURT MISREAD THE PLAIN MEANING OF THE STATUTE AND THE APPLICABLE LEGISLATIVE HISTORY.

This Court has repeatedly affirmed the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). Stated another way, courts are required to assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *H.J. Inc. v. Northwestern Bell Telephone Co.*, \_\_\_ U.S.L.W. \_\_\_ (June 26, 1989) slip op. at 7 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

Applying these basic principles of statutory construction to the statute and facts in the case at bar leads to the inescapable conclusion that the PRA's coverage extends to recordkeeping for the benefit of third parties and to the agency's substantive policy decisions reflected in regulations requiring recordkeeping.

It is clear that the Paperwork Reduction Act covers "recordkeeping." 44 U.S.C. §§ 3502(4), (11). We in Congress specifically defined the term "recordkeeping" to mean a "requirement imposed by an agency on persons to maintain specified records." 44 U.S.C. § 3502(17). On its face, then, this definition contemplates a federally sponsored requirement which entails maintaining information for public, third party, or other disclosure purposes.

The notion that PRA covers only information which must eventually go to the government is a crabbed reading of the statute. To the contrary, the legislative history demonstrates just the opposite. This "definition

[of "recordkeeping"] includes information maintained by persons which may be *but is not necessarily provided to* a Federal agency." S. Rep. No. 96-930, 96th Cong., 2d Sess. 40 (1980).

Had the Third Circuit properly reviewed the legislative history of PRA, that court would have discovered explicit consideration of whether regulations which require persons to disclose information to third parties should be covered by the clearance requirements of the Act. Both the House and Senate spoke directly to this precise issue.

In 1973, the Congress amended the Federal Reports Act of 1942 and gave the General Accounting Office (GAO) the clearance authority previously held by the Director of the Office of Management and Budget (OMB) for information collected by the independent regulatory agencies. (Pub. L. 93-153, § 409). The Comptroller was frustrated in his efforts to perform his clearance responsibilities because several agencies resisted the GAO's efforts by asserting, among other things, that disclosure requirements to third parties were not covered by the Federal Reports Act definition of "information". (See Federal Reports Act of 1942, 44 U.S.C. § 3502 (1976)).

In a report to Congress in 1976, the Comptroller commented:

Two agencies, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), believe that only a small number of their information-gathering activities are subject to the Federal Reports Act.

SEC believes that some of its activities involve collection of information subject to 44 U.S.C. 3512, but other SEC responsibilities involve the "disclosure" of information to the public rather than

collection activities, and accordingly, are not subject to that provision. The SEC contends that, in contrast to other Government agencies which solicit information for their own purposes, SEC serves as a conduit through which information is disclosed to investors pursuant to Federal securities laws.

\* \* \*

The underlying reasons for these agencies' refusal to submit most of their forms to us for clearance are that they believe this would be an intrusion into their regulatory responsibilities. We disagree with the position of SEC and CFTC and are currently working with these agencies to resolve the issue.

Report to the Congress by the Comptroller General of the United States, "Status of GAO's Responsibilities Under the Federal Reports Act", OSP-76-14, May 28, 1976, at 15-16.

The Comptroller recommended that Congress clarify and strengthen the Federal Reports Act "to allow the clearance agency to challenge the need for regulatory information." *Id.* at 20.

In 1974, the Congress established the Commission on Federal Paperwork. Pub. L. No. 93-556, 93d Congress, 88 Stat. 1789. "The legislation was the result of congressional concern that the Federal Reports Act of 1942 was not effective in limiting the Federal paperwork burden." *See*, Legislative Digest Section, Office of the General Counsel, United States General Accounting Office, "Legislative History of the Commission on Federal Paperwork," at iii. Since the Comptroller General and the Director of OMB were statutory members of the Commission, the issue of whether disclosure requirements to third parties should be covered by the clearance process was thrashed out

by those entities which had a direct role in implementing the statute. *See* "The Reports Clearance Process", A Report of the Commission on Federal Paperwork 43 (1977).

The Commission on Federal Paperwork noted:

The Act is not clear on its coverage of a major portion of the paperwork burden--recordkeeping requirements--although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines....Not all agencies covered by the Federal Reports Act comply fully with its requirements.

For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws. There were negotiations and discussions from time to time between the OMB and the agencies concerned, not always with clear-cut resolution. Generally, the OMB was not inclined to make a head-on confrontation, nor did it have any specified statutory means to enforce compliance.

*Id.* at 1.

In June of 1978, when I held Senate hearings on efforts to reduce federal paperwork burdens, the Comptroller General brought his views and that of the

Paperwork Commission to my attention. *Efforts to Reduce Federal Paperwork Burdens: Hearing before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, 95th Cong., 2d Sess. 45 (1978).* The term "recordkeeping" was incorporated in the definition of "collection of information" in S. 1411, the bill I introduced in June 1979.<sup>1</sup> Congressmen Brooks and Horton (who was a Chairman of the Paperwork Commission) introduced H.R. 6410, a House companion to S. 1411 in February of 1980.<sup>2</sup> When the Comptroller General testified before them, he noted that their bill included his recommendations to resolve the problems he and the Paperwork Commission had identified with the clearance process.

Section 101 of the bill replaces the Federal Reports Act, incorporating five needed changes. First, recordkeeping requirements are specifically included in the reports clearance process.

\* \* \*

The Federal Reports Act is presently unclear on whether recordkeeping requirements are subject to clearance. In practice, both GAO and OMB have required that they be cleared. Some agencies, however, have resisted compliance with these

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<sup>1</sup>For the text of S. 1411, see *Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, 96th Cong. 1st Sess. 89 (1979).*

<sup>2</sup>For the text of H.R. 6410, see *Paperwork Reduction Act of 1980: Hearings before a Subcommittee on Government Operations, House of Representatives, 96th Cong. 2d Sess. 3 (1980).*

efforts.<sup>3</sup>

The House Committee gathered statements from the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Reserve System, and the Securities and Exchange Commission, all of which raised concerns relating to the proposed changes to the Reports Act. *Id.* at 313-36.

The SEC, for example, commented as follows:

This expansion of the scope of the Federal Reports Act is of major concern to us. We do not think the purpose of the Bill is, or should be, to subject the Commission's disclosure and enforcement efforts to oversight by the Office of Management and Budget. We do not believe, for example, that OMB should determine whether information about possible selfdealing between corporate officers and the company ought to be disclosed in a proxy statement. The definition of "collection of information" is so broad, however, that it could be read as encompassing this information, which is collected on standard, statutorily authorized forms.

*Id.* at 331.

On the Senate side, I held hearings in November of 1979 and invited the SEC and FCC to testify publicly on their concerns, since the Senate bill also incorporated the term "recordkeeping" in the definition of "collection of information" and "information collection requests". Commissioner Evans of the SEC and Commissioner Brown of the FCC expressed concerns similar to ones

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<sup>3</sup>*Id.* at 39.

raised in the House over the breadth of the term "collection of information." I responded in part:

Well, we are delighted to get that best advice and that is the reason for this hearing, to get your concerns about it.... Yet, when we go out into the countryside, when we go out and listen to people, they do not feel anybody is doing a good job, the Congress, the executive branch, the independent regulatory agencies, or anyone. They are demanding that something be done. So, again, we are talking about weighing something here. We are talking about not wanting to cripple the mission of the independent regulatory agencies nor the mission of the executive agencies like EPA and OSHA and all of the other agencies that are vital to the well-being of this country. But at the same time, we are trying to put some governor on this thirst for information and some rational decisionmaking processes that Congress can review and that the people can hold accountable, and that we can say we are trying to get a handle on.

*Paperwork and Redtape Reduction Act of 1979: Hearings on S. 1411, 96th Cong. 1st Sess. 87 (1979).*

The Congress deliberately adopted the definition of recordkeeping that had been recommended to it by the Comptroller General and the Paperwork Commission. Both the Senate and House Reports spoke directly to the point of whether disclosure requirements were to be covered by the Act's requirements.

Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other

persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. The definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 39-40 (1980).

The House Report expressed a similar view:

The definition of "collection of information" clarifies an ambiguity as to the types of information collection covered by the Act. The Comptroller General testified that certain interpretations, such as that by the Securities and Exchange Commission, severely limit the scope of the act and the controls over Federal information collection efforts.

\* \* \*

The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory

information collection clearance requirements. The Committee fully expects SEC to comply with the "more extensive" definition of collection of information contained in H.R. 6410. (*Id.* at 23).

H.R. No. 96-835, 96th Cong. 2d Sess. 19-23 (1980).

As the Senate floor manager to the Paperwork Reduction Act, I reiterated the Act's broad coverage and application to federally sponsored collections of information when the full Senate unanimously consented to pass the legislation.

Today many Federal programs attempt to serve large numbers of people in a variety of ways, such as protecting civil rights, providing decent housing and insuring safe and healthy working conditions.

In those and other areas, Congress has made critically important commitments to the people of this Nation. In order to be effective, many of those programs must collect information from the public in order to make intelligent decisions on standards, benefits, and other Government actions. In other cases, information must be collected in order *to inform the public* of various matters of general concern.

The Paperwork Reduction Act has a twofold objective. First, it will insure that agencies make only necessary--and I underline that, Mr. President, necessary--information requests of the public. And second, those burdens which are found to be unnecessary and wasteful will be eliminated.

126 Cong. Rec. S14686 (November 19, 1980) (emphasis added).

During the signing ceremony for the Act, President Carter commented similarly to those of us who were in attendance and had worked to shape the legislation.

The act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public. For the first time it allows OMB to have the final word on many of the regulations issued by our Government. It *also* ensures that the public need not fill out forms *nor keep records* which are not previously approved by OMB.

Presidential Documents, Administration of Jimmy Carter, December 11, 1980, at 2795 (emphasis added).

The applicable legislative history thus reveals that we in the Congress and the President<sup>4</sup> contemplated that disclosure requirements promulgated by the federal agencies would fall under the accountability requirements of the statute.

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<sup>4</sup>See *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661-62 (4th Cir. 1969) (relying in part on President Truman's signing statement to hold that the Portal-to-Portal Act required an objective rather than subjective test for good faith).

## II. THE THIRD CIRCUIT IGNORES THE STATUTORY SCHEME OF THE ACT

The Paperwork Reduction Act, as a re-codification and expansion of the Federal Reports Act of 1942, is deliberately structured as a coordinated whole, with its various provisions building upon and reinforcing each other. Agencies are required to justify their need for a recordkeeping requirement and submit their proposal to the Office of Management and Budget. The public is to have early and meaningful opportunity to comment as part of the review process. As the ultimate sanction and public protection, if an agency fails to participate in the statute's review process, or fails to display a current control number, then, "[n]otwithstanding any other provision of law," the public is not subject "to any penalty for failing to maintain" information. 44 U.S.C. § 3512.

In this context, the Ninth Circuit opinion in *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989) is instructive. In *Smith*, the Ninth Circuit was faced with determining whether a Forest Service regulation, promulgated pursuant to the agency's statutory mission, entailed a "information collection request" within the meaning of the Paperwork Reduction Act. The Court ruled the regulation did constitute an information collection request, and that since it did not display a current OMB control number, as required by section 3512 of the Act, the criminal convictions had to be reversed.

In acknowledging the statutory scheme underpinning the Paperwork Reduction Act which culminates in the public protection section, (44 U.S.C. § 3512) the Ninth Circuit recognized that an agency engaged in enforcing criminal sanctions of its substantive programs was not relieved from its responsibilities under the Paperwork Reduction Act. The Court thereby affirmed a

fundamental premise of the Paperwork Reduction Act that every person is entitled to be assured that their government has checked the need for information before it asks them to provide or maintain information.

While the regulation in question in *Smith* required a person to provide information to the government, the case is important here because the regulation in *Smith* requiring a permit and the pursuit of criminal sanctions by the agency for a failure to obtain the permit certainly embodies substantive policy decision making. Yet the Third Circuit's reading of the two provisions of the Act -- § 3504(a) and § 3518(e) -- in isolation rather than as part of the Act as a whole, alternatively held that if an agency activity involving the collection of information involves "substantive policy decision making," it is relieved from its responsibilities under the Paperwork Reduction Act to submit its proposals to the Director and the public for review. 855 F.2d at 112. This narrow reading of the PRA is contrary to the decisions in *Smith* and *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending (No. 88-849), as well as violative of the principle of statutory construction that the provisions of a statute should be read in harmony with the entire statutory scheme. See *K mart Corp. v. Cartier, Inc.*, 108 S.Ct. 1811 (1988).

The Third Circuit's interpretation of the PRA wrongly excludes substantive policymaking from PRA's coverage. Federal agencies assert, and will continue to assert that every rulemaking activity embodies substantive policy decisions entrusted to them. If the converse were so, they would have no reason to issue a rule in the first place. The Third Circuit opinion would thus permit the whole of rulemaking activities involving information collection requests of the public to escape all the accountability requirements of the Act, whether or not the information goes to the government. Such a

sweeping exemption would render the PRA a nullity and would assume Congress wore blinders in enacting the PRA.

The legislative history demonstrates vividly that we in Congress were well aware that agency proposals for the collection of information involve and embody substantive policy decisions. The Senate Report stated:

In both hearings on S. 1411 and letters received by the Committee, representatives of the independent regulatory agencies argued that their agencies autonomy would be adversely affected by a transfer back to OMB to due the difficulties of separating information management from substantive agency policymaking. They argued that information management may require a balancing of competing interests--such as societal needs, the burden on the public, privacy, and budget impact--all of which could touch upon the substance of policy.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 14.

Similarly, the House Report noted:

The Committee agrees with both FCC and SEC as to the close relationship between policymaking and information management. However, regulatory agencies in the executive branch, such as EPA, have been able to justify to OMB their need for information used to establish policy or for other purposes.

H. Rep. No. 96-835, 96th Cong., 2d Sess., at 23.

But Congress envisioned an oversight role for itself over any abuse by OMB. As the Senate Report stated:

The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

S. Rep. No. 96-930, 96th Cong., 2d Sess. at 16.

I also want to bring to the Court's attention that several of the Congressional sponsors of the Paperwork Reduction Act were present in the White House on November 30, 1979 when President Carter signed Executive Order 12174 on Federal Paperwork Reduction. On this occasion the President, based on his Constitutional authority to take care the laws be faithfully executed, established procedures directing the Director of OMB to review recordkeeping requirements imposed upon the public by executive branch agencies. See Preamble and Section 1-101 of Executive Order No. 12174.

Among other purposes, the Congressional sponsors, who witnessed President Carter's signing of this Executive Order, intended the impending Paperwork Reduction Act both to make the President's assertion of executive authority a matter of statutory law and to extend the clearance process to independent regulatory agencies. That was the understanding of the day. See Presidential Documents, Administration of Jimmy Carter, November 30, 1979, at 2176-82.

The Third Circuit's narrowing of the coverage of the Paperwork Reduction Act would not only do violence to the substantive provisions of the PRA, it would also amount to a *decreasing* of the President's authority previously acknowledged in Executive Order No. 12174.

Such a consequence is expressly prohibited by the provisions of Section 3518(e):

Nothing in this Chapter *shall be interpreted* as increasing or *decreasing* the authority of the President..., under the laws of the United States, with respect to the substantive policies and programs of departments....(emphasis added).

Given the statutory scheme, the Paperwork Reduction Act should not be interpreted to "insulate" the Director of OMB *or the agencies* from undertaking procedural and substantive responsibilities the President could otherwise direct them to do under his inherent Constitutional authority, especially where, as here, the agency involved is a Cabinet level agency as opposed to an "independent" regulatory agency.

### CONCLUSION

As I noted when Congress amended the Paperwork Reduction Act in 1986:

A fundamental premise of the Paperwork Reduction Act is that every citizen is entitled to have their Government check the need for information requests made of them....

The law was intended to be comprehensive in its coverage of federally sponsored "collections of information." Exemptions to this coverage, either by agency or by class of information were specifically set out in the definitions of section 3502 or the savings provisions of section 3518. The notion the law was dedicated primarily to "forms, questionnaires, and surveys" and not to other instruments such as reporting, recordkeeping, and

disclosure requirements which are means to carry out federally "sponsored collections of information" is a fundamental misreading of what the law states, what the Congress of 1980 intended, and what this Committee affirms in the amendments of 1986....

132 Cong. Rec. 16740 (1986) (Statement of Sen. Chiles upon Senate passage of the Paperwork Reduction and Reauthorization Act of 1986).<sup>5</sup>

The lower court opinion interprets the Paperwork Reduction Act in a way directly contrary to the plain meaning of the statute and the understanding of the Senate and House of Representatives when they enacted the statute in 1980 and amended it in 1986.

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<sup>5</sup>During hearings on the amendments to the Paperwork Reduction Act in April of 1984, Respondent Public Citizen urged Congress "to make it absolutely clear, once and for all," that disclosure requirements "have nothing to do with the Paperwork Reduction Act of 1980 or this year's amendments." *Paperwork Reduction Act Amendments of 1984: Hearing before the Subcomm. on Information and Management and Regulatory Affairs of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 238 (1984). As my statement in 1986 observed, Congress rejected this notion not only in 1986, but in 1984 and 1980 as well. See S. Rep. 98-576, 98th Cong., 2d Sess. at 43. Respondent Public Citizen now finds itself before this Court seeking a judicial remedy for what Congress specifically chose not to do.

For these reasons, Amicus urges the Court to reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
October Term, 1988

ELIZABETH M. DOLE, Secretary of Labor, *et al.*  
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA,  
AFL-CIO-CLC, *et al.*  
*Respondents.*

On a Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit

**BRIEF OF AMICI CURIAE,  
NATIONAL-AMERICAN WHOLESALE GROCERS'  
ASSOCIATION, FOOD MARKETING INSTITUTE,  
AND NATIONAL GROCERS ASSOCIATION  
IN SUPPORT OF REVERSAL**

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IN THE  
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On a Writ of Certiorari to the United States Court of Appeals  
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**BRIEF OF AMICI CURIAE,  
NATIONAL-AMERICAN WHOLESALE GROCERS'  
ASSOCIATION, FOOD MARKETING INSTITUTE,  
AND NATIONAL GROCERS ASSOCIATION  
IN SUPPORT OF REVERSAL**

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**STATEMENT OF INTEREST**

This brief is respectfully submitted on behalf of the National-American Wholesale Grocers' Association, the Food Marketing Institute, and the National Grocers Association as *amici curiae*. The three trade associations joining in this brief are representatives of this nation's wholesale and retail distributors of food, grocery, and related products who would be adversely affected if the decision below is allowed to stand. *Amici* support the position of the federal Petitioners and urge reversal of the decision below. The written consent of all parties of

record to *amici's* submission of this brief has been filed with this Court.

The National-American Wholesale Grocers' Association (NAWGA) is a national trade association comprised of grocery wholesale distribution companies which primarily supply and service independent grocers throughout the United States and Canada. It provides research, technical, educational, and government relations programs on behalf of its 400 members. NAWGA members operate nearly 1,200 distribution centers nationwide with a combined annual sales volume in excess of \$81 billion, accounting for nearly three-quarters of the nation's grocery supply sales. NAWGA members employ in excess of 350,000 people nationwide; in combination with their independently owned supermarkets, they provide employment for several million people. The independent grocer represents over 50% of the total retail food sales in this country and is one of the strongest segments of independent business in the nation. NAWGA's foodservice division, the International Foodservice Distributor's Association (IFDA), represents member firms that sell annually over \$20 billion in food and related products to the institutional, away-from-home foodservice market.

The Food Marketing Institute (FMI) is a nonprofit association conducting programs in research, education, and public affairs on behalf of its 1,500 members, who are food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume accounting for one-half of all grocery sales in the United States. More than three-fourths of the FMI's membership is composed of independent supermarket operators or small regional firms.

The National Grocers Association (NGA) is a national trade

association representing over 2,300 retail grocers, retailer-owned cooperatives, and food wholesalers in the independent small business sector of the food industry. NGA retail grocers operate over 50,000 retail food stores, including convenience stores, grocery stores, and supermarkets throughout the United States. NGA's retailer-owned cooperatives and food wholesalers distribute food, grocery, and related products through their food distribution centers to retail grocers.

On August 24, 1987, the Occupational Safety and Health Administration (OSHA) promulgated a revised and expanded Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200 (1988), that applies to the food and grocery distribution industries, as well as other industries in the non-manufacturing sector of the economy. The primary purpose of the revised and expanded HCS is to provide workers in all industries with information about the safe handling and use of hazardous products in the workplace. 52 Fed. Reg. 31852 (Aug. 24, 1987).

As promulgated, the HCS covers a large number of everyday household products, such as oven cleaner, bleach, floor wax, and charcoal briquettes; analogous products packaged for institutional use; and drug products. A typical member firm of *amici* may handle up to 1,200 different products subject to the HCS. Each product covered by the HCS is the subject of a Material Safety Data Sheet (MSDS), which generally describes the characteristics and hazards of the product, is typically one to four pages in length, and is prepared by the product manufacturer. MSDSs must be distributed downstream, from product manufacturers through wholesale distribution channels, to retailers so they can be given to any ultimate purchasers that will use the products on the work site. Because each wholesale distribution facility may service thousands of different retail or institutional foodservice

establishments, the HCS will require that facility to obtain, maintain, and distribute millions of pieces of paper each year.

Inclusion of common household products within the scope of the HCS creates significant paperwork burdens for the food and grocery distribution industries and also duplicates the regulatory requirements of other federal agencies. At the same time, these products typically present worker risks that are trivial and commonly known.

Under the authority of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, the Office of Management and Budget (OMB) reviewed the HCS and approved the overwhelming bulk of its requirements. In relevant part, OMB disapproved any coverage of consumer products, similar products in the same form and concentration as consumer products, and drug products from the scope of the HCS. The HCS became effective save for those provisions OMB disapproved.

In the case before this Court, the United States Court of Appeals for the Third Circuit reversed OMB's disapproval and reinstated OSHA's onerous requirements, resulting in a wholly unnecessary paperwork burden on the food and grocery distribution industries that will result in no significant benefit for employees. Accordingly, *amici* have a strong economic interest in the outcome of this case and respectfully urge this Court to uphold OMB's authority to disapprove needless and duplicative provisions of the HCS under the Paperwork Reduction Act.

### PROCEEDING BELOW

In the proceeding below, the Third Circuit held that OMB did not have statutory authority, under the Paperwork Reduction Act, to disapprove provisions of the HCS as applied to, in relevant part, consumer products and drug products. *United*

*Steelworkers v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). The Third Circuit based its decision on two separate grounds. First, the Third Circuit concluded that the regulations disapproved by OMB do not involve the "collection of information" within the meaning of the Act. *Id.* at 112. Second, the Third Circuit held that OMB had impermissibly substituted its judgment on substantive matters for OSHA's judgment. *Id.* at 113.

### SUMMARY OF ARGUMENT

The HCS provisions disapproved by OMB, which were clearly "information collection requests" within the meaning of the Paperwork Reduction Act, would impose huge burdens on the food and grocery distribution industries. Tens of millions of individual pieces of paper would have to be produced, transferred, filed, and updated by a distribution system encompassing at least three distinct tiers and thousands of individual firms. These burdens would not result in any discernible contribution to OSHA's mission of protecting worker safety and health. Workers are already extensively protected by existing labeling requirements and by training requirements of the HCS that remain in force as well as by regulation of these products by other federal agencies.

Prior judicial decisions have noted that an agency's focus on its area of immediate concern may cause it to impose great costs that produce little or no benefit. Under the Paperwork Reduction Act, OMB has the responsibility to protect against this tendency by ensuring that agencies do not impose heavy information collection burdens that are unnecessary to the performance of the agency's mission or duplicative of requirements imposed by other statutes. That responsibility was properly exercised here.

The reversal of OMB's decision by the Third Circuit should be vacated and OMB's implementation of the Paperwork Reduction Act should be upheld by this Court.

## ARGUMENT

### I. THE HAZARD COMMUNICATION STANDARD PROVISIONS REINSTATED BY THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT IMPOSE UNWARRANTED BURDENS UPON THE FOOD AND GROCERY DISTRIBUTION INDUSTRIES WITHOUT BESTOWING ANY APPRECIABLE BENEFITS.

*Amici* note initially that a reversal of the Third Circuit's judgment would not, nor should it, leave employees in the food and grocery distribution industries totally outside of the scope and coverage of the HCS. To the extent that employees within these industries actually use "hazardous" products, employers would still be required to train and inform employees about the proper storage, use, and handling of these products. For example, all of the HCS's requirements, including employee safety training and the maintenance of MSDSs, would still be observed for such substances as waste oil and diesel fuel in a warehouse's delivery truck repair shop.

Turning to the relevant regulatory provisions, the HCS requires manufacturers of so-called "hazardous" products to prepare MSDSs for their products.<sup>1</sup> 29 C.F.R. § 1910.1200(g)

<sup>1</sup>Industries in which employees only handle "hazardous" products in sealed containers are, in theory, subject to slightly less stringent requirements than industries in which "hazardous" products are used. See 29 C.F.R. § 1910.1200(b)(4) (1988). Nevertheless, firms in these industries, such as warehousing and retailing, are required to maintain copies of MSDSs received from product manufacturers, to obtain any MSDSs

(1988). The HCS does not set forth a list of all "hazardous" products. Rather, manufacturers are required to evaluate their products, using criteria that are part of the HCS, to determine whether the products are "hazardous." See 29 C.F.R. § 1910.1200(d) (1988) and its Appendices A, B, and C. These criteria are very broad and much discretion is left to the product manufacturers. As a result, up to 1,200 everyday household products handled by *amici*'s members are covered by MSDSs.

An MSDS for a "hazardous" product is required to include the following information: chemical and common name(s), physical and chemical characteristics, physical hazards, health hazards, primary routes of contact, information about the permissible exposure limits, generally applicable precautions for safe handling and use, whether the substance is identified as a possible carcinogen, emergency and first aid procedures, and the identity and telephone number of a source of additional information regarding emergency procedures. 29 C.F.R. § 1910.1200(g) (1988). There is no required standard format for an MSDS. While the information contained in MSDSs is undoubtedly useful for some types of products, this information is unnecessary for the types of household and consumer products distributed by *amici*'s members.

Manufacturers of "hazardous" products are required to distribute MSDSs to their downstream customers, including firms in the food and grocery distribution industries. 29 C.F.R. § 1910.1200(g)(6) and (7) (1988). In turn, wholesalers must make the MSDSs available to subsequent wholesale distributors and retailers, who are required to provide MSDSs

not received from product manufacturers upon the request of any employee, and to ensure that MSDSs are available to employees during each workshift in their work areas. 29 C.F.R. § 1910.1200(b)(4)(ii) (1988). As a practical matter, the "sealed container" provisions are of no benefit to *amici*'s members.

to the ultimate purchasers of these products should the product be used in any employment setting, as well as to institutional customers such as foodservice establishments. 29 C.F.R. § 1910.1200(g)(6) and (7) (1988). Under the HCS reinstated by the Third Circuit, wholesalers must pass down MSDSs to retailers unless all purchasers from the retailer are not "commercial customers"<sup>2</sup> and the retailer so informs the wholesaler. 29 C.F.R. § 1910.1200(g)(7) (1988). Whether a particular end purchaser is a "commercial customer" depends on the manner in which the product ultimately will be used.

Each member of the food and grocery distribution industries represented by *amici* handles up to 1,200 different products that are covered by MSDSs prepared by the products' manufacturers. Many products covered by MSDS requirements also come under different brands, thereby further multiplying the number of required MSDSs. These products include a variety of everyday household products such as household cleanser, bleach, charcoal briquettes, and oven cleaner; analogous products of the same form and concentration but packaged for use by institutional foodservice kitchens such as restaurants and caterers; and prescription and over-the-counter (OTC) drug products.<sup>3</sup>

<sup>2</sup>A "commercial customer" is one that purchases a product for on-the-job use. See 52 Fed. Reg. 31866 (Aug. 24, 1987). After the OMB disapproval decision, OSHA proposed to define "commercial account" as "an arrangement whereby a retail distributor sells hazardous chemicals to an employer, generally in large quantities over time and at costs that are below the regular retail price." 53 Fed. Reg. 29822, 29852 (Aug. 8, 1988). That rulemaking is still pending.

<sup>3</sup>Arguably, some food products might be within the scope of the HCS. In particular, food products for institutional use might be covered because they are not expressly exempt. See 29 C.F.R. § 1910.1200(b)(6)(v) (1988) (HCS exemption for food "in a retail establishment which are packaged for sale to consumers").

As promulgated in August 1987, the HCS includes two limited exemptions for these products that in theory have some applicability to the food and grocery distribution industries. Although well-intended, these exemptions are of no practicable utility. Accordingly, members of *amici* are still subject to the tremendous burdens associated with the MSDS requirements.

#### **A. The HCS Exemption for CPSC-Regulated Products Is of No Use to the Food and Grocery Distribution Industries**

Products regulated by the Consumer Product Safety Commission (CPSC) were exempted from the scope of the HCS provided "the employer can demonstrate [the products or substances are] used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." 29 C.F.R. § 1910.1200(b)(6)(vii) (1988).<sup>4</sup>

In fact, the exemption for CPSC-regulated products is of no value to the food and grocery distribution industries. Should a subsequent purchaser use the product or substance in the workplace in a manner that exceeds normal consumer usage, *amici*, as part of the distribution chain, would still be required to obtain, retain, and disseminate an MSDS concerning that product or substance. Members of *amici* cannot ensure that CPSC-regulated products will not be purchased from a retail store by an employer and used on-the-job by a worker in a manner that exceeds typical consumer usage.

<sup>4</sup>"Consumer products," as defined in the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, and "hazardous substances," as defined in the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, are within the scope of the regulatory exemption. 29 C.F.R. § 1910.1200(b)(6)(vii) (1988).

The inadequacy of this exemption is compounded in its application to the MSDS pass down requirement. A wholesaler of "hazardous" products need not provide MSDSs to a retail account that has affirmatively notified the wholesaler that the products are neither used on-the-job by the retailer's own employees nor sold at the retail level to commercial customers. 29 C.F.R. § 1910.1200(g)(7) (1988). However, a typical grocery retailer has thousands of different, anonymous customers. Short of the absurd task of asking every one of thousands of different customers about the intended use of thousands of "hazardous" products sold by the retailer, the retailer has no choice but to assume that some "hazardous" products are being purchased by employers for use on the work site.<sup>5</sup> Moreover, even if some retailers were to notify their suppliers that MSDSs are not required for certain products, there would nevertheless be a significant paperwork burden associated with tracking each retailer and each product. As a practical matter, a wholesaler might conclude it is easier to distribute an MSDS for each product to each of its downstream customers.

<sup>5</sup>It is hardly surprising that these purchases by employers should take place from retail stores. Many small companies that incidentally use "hazardous" household products on the work site may, as a matter of convenience, purchase them, in retail quantities, at the retail level. An employee of a small plumbing firm for example, may use a household cleanser to clean the company premises. Because the company is in the plumbing business — not the janitorial business — it may not have an account with a supplier of commercial cleaning products. A logical place for that plumbing company to purchase small quantities of household cleanser is the retail grocery or supermarket.

## B. The HCS Exemption for Drug Products Is of Little Use to the Food and Grocery Distribution Industries

Drug products are covered by two marginally useful exemptions. Drugs "in solid, final form for direct administration to the patient (*i.e.*, tablets or pills)" are exempt from the scope of the HCS. 29 C.F.R. § 1910.1200(b)(6)(viii) (1988). In addition, all drugs, even if not in tablet or pill form, are exempt if they are packaged for retail sale to consumers and are held in a retail establishment. 29 C.F.R. § 1910.1200(b)(6)(v) (1988).

A variety of packaged, OTC drug products that are not in pill or tablet form, *e.g.*, liquid cough medicines and topical ointments, could be considered "hazardous." These packaged OTC drug products are exempt only when held at the *retail* level. 29 C.F.R. § 1910.1200(b)(6)(v) (1988). Thus, they are subject to the HCS's MSDS requirements when held in *wholesale* grocery warehouses operated by members of *amici*. Insofar as *amici*'s members may distribute these drug products to their own or third-party wholesale facilities, MSDS pass down requirements would likewise apply.

In addition, members of *amici* and their customers operate retail pharmacies located in retail groceries and supermarkets. Prescription drug products are not packed for retail sale; rather, by law they must be dispensed by trained pharmacists who are licensed under applicable state laws. Unless a prescription drug product is in tablet or pill form, it is not exempt from the HCS. If these drug products are "hazardous" within the meaning of the HCS, they are subject to the HCS's MSDS requirements, even though they are dispensed only by licensed pharmacists at the retail level. As noted by OMB, the end result is "the odd situation in which a drugstore owner [such as a grocer or supermarket] would be responsible for training

professional pharmacists about the hazards of the drugs they handle." Pet. Writ Cert. 22a, 37a.

### C. The HCS Imposes Significant Paperwork Burdens on the Food and Grocery Distribution Industries

The burden imposed on the food and grocery distribution industries by the HCS is tremendous. In its decision reviewing the paperwork requirements of the HCS, OMB noted that, according to information supplied by *amicus* FMI, a "typical supermarket would sell 1,200 non-food consumer products that may be covered by the HCS." Pet. Writ Cert. 35a. Thus, a typical retail supermarket may have to establish and maintain a filing and distribution system for approximately 1,200 different MSDSs should the Third Circuit's decision be allowed to stand. Not only must these MSDSs be received, filed, and made readily available to any commercial customers, but the MSDS file must be kept up-to-date as new or revised MSDSs are prepared by product manufacturers and distributed downstream, through *amici's* wholesaler members, to that retailer.

The burden on *amici's* members is compounded by the fact that products sold in retail groceries and supermarkets almost never pass directly from the product manufacturer to the retailer. Instead, products go from the product manufacturer, through one or more levels of wholesale distribution, before they reach the retailer. A typical large wholesale grocery warehouse may handle up to 1,200 different products covered by MSDSs, which are received from manufacturers and distributed in turn to several dozen smaller, regional or local wholesale warehouses. Each of these smaller warehouses may service hundreds of different retail and institutional foodservice establishments. Each retailer may have more than one

wholesale source for any particular product. Establishments at each level of distribution must obtain, retain, and disseminate MSDSs.

The total number of food and grocery distribution establishments involved is huge. For example, there are approximately 180,000 different retail grocery establishments in the United States. A typical wholesale facility may service up to 1,000 different retail establishments. A typical foodservice distributor may serve thousands of different institutions such as restaurants and caterers.

As a result of this layered distribution network for grocery items, MSDSs involving, for example, 1,200 "hazardous" products, could result in the need to receive, catalogue, file, and distribute millions pieces of paper each year for a single grocery distribution firm. Given the volume of paper involved, as well as the minimal benefits to be derived thereby, the paperwork burden associated with the HCS, in the absence of OMB's across-the-board exemptions, is staggering.

Further compounding the burden on *amici's* members is the continually changing nature of the products they handle. Consumer products are by no means static. Each year many new products are introduced and existing products are changed, resulting in new or revised MSDSs. Even if products are unchanged, MSDSs must be updated by product manufacturers to take into account new scientific, technical, or medical information. 29 C.F.R. § 1910.1200(g)(5) (1988).

The availability to workers of MSDSs for the two classes of products covered by the OMB disapproval decision (consumer products and drugs) will not result in any appreciable increase in workplace safety or diminution of workplace hazards. The purported hazards associated with these products simply are no greater, either qualitatively or quantitative-

ly, than the hazards typically presented by familiar household products used in the home and that are already federally regulated as to labeling, safety, and storage information.

In light of the burdens involved, OMB disapproved coverage under the HCS of:

any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) [Pub. L. No. 99-499, 100 Stat. 1613 (1986)]: "Any substance to the extent it is used for personal, family or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public."

Pet. Writ Cert. 35a-36a. OMB also disapproved all coverage outside the manufacturing sector of drug products regulated by the Food and Drug Administration (FDA). Pet. Writ Cert. 37a.

The effect of the OMB disapproval decision was to create two across-the-board exemptions for CPSC-regulated consumer products and FDA-regulated drugs from the scope of the HCS. Because these categories of products are totally exempt from the HCS, the food and grocery distribution industries are not burdened by its requirements, including, most importantly, the MSDS requirements. In contrast, as noted above, the HCS as promulgated in August 1987 does not provide any meaningful exemptions for either consumer products or drug products.<sup>6</sup>

<sup>6</sup>One practical result of the overbroad imposition of MSDS requirements upon consumer and drug products resulting from the Third Circuit's decision is that product manufacturers may prepare and distribute MSDSs for products that are not, in fact, "hazardous" in the regulatory sense. This is done to provide extra protection against product liability claims. Members

## II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONTRARY TO THE EXPRESS STATUTORY PURPOSE OF THE PAPERWORK REDUCTION ACT TO MINIMIZE FEDERALLY MANDATED PAPERWORK

The statutory purpose of the Paperwork Reduction Act is embodied in 44 U.S.C. § 3501, which provides, in pertinent part, that "[t]he purpose of this chapter is . . . to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." The Director of OMB in the Executive Office of the President is entrusted with carrying out this mission. 44 U.S.C. § 3504(a); *see also* S. Rep. No. 930, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. CODE, CONG. & ADMIN. NEWS 6241, 6245-46.

The authority of the Director in this regard includes the power to determine "*whether* the collection of information by an agency is *necessary* for the proper performance of the functions of the agency." 44 U.S.C. § 3504(c)(2) (emphasis supplied). "To the extent, if any, that the Director determines that the collection of information by an agency is *unnecessary*, for any reason, the agency may not engage in the collection

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of *amici* are theoretically free to make their own determinations about whether products are "hazardous" for purposes of the HCS, thereby allowing them to disregard all MSDSs received from product manufacturers for products that are not in fact "hazardous" in the regulatory sense of the word. 29 C.F.R. § 1910.1200(d)(1) (1988). As a practical matter, however, members of *amici* lack the expertise to do so. Thus, absent broad, across-the-board exemptions for general categories of products from the HCS, such as those that the Third Circuit invalidated, the food and grocery distribution industries have little choice but to maintain and distribute all MSDSs received.

of the information." 44 U.S.C. § 3508 (emphasis supplied).<sup>7</sup> The Director, in making this determination, must consider whether the information sought "(1) has practical utility for the agency, (2) is *not more than the minimum needed* to meet the agency's objective, or (3) is not *duplicative* of similar information otherwise accessible." S. Rep. No. 930 at 49, 1980 U.S. CODE, CONG. & ADMIN. NEWS 6289 (emphasis supplied). As promulgated by OSHA and as reinstated by the Third Circuit, application of the MSDS requirements to consumer products and drugs within the food and grocery distribution industries fails both the second and third prongs of this test.

<sup>7</sup>The Paperwork Reduction Act grants the Director the authority to approve or disapprove "information collection request[s]." 44 U.S.C. § 3504(c). Information collection requests are defined to include:

a written report form, application form, schedule, questionnaire, reporting or *recordkeeping requirement*, collection of information requirement, or *other similar method calling for the collection of information*.

44 U.S.C. § 3502(11) (emphasis supplied). A "recordkeeping requirement" is further defined to mean "a requirement imposed by an agency on persons to *maintain* specified records." 44 U.S.C. § 3502(17) (emphasis supplied). The underlying OSHA regulation on MSDSs requires:

The employer shall *maintain* copies of the required material safety data sheets for each hazardous chemical in the workplace, and *shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s)*.

29 C.F.R. § 1910.1200(g)(8) (1988) (emphasis supplied). The MSDS to be maintained by all employers is clearly (1) the obtaining and maintaining of facts, (2) through the use of a recordkeeping requirement, (3) for specified records. As such, it is an "information collection request" requiring approval by the Director. See *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, 1453-54 (D.C. Cir. 1988) *pet. for cert. pending* No. 88-849 (filed Nov. 22, 1988) (under the substantially similar definitions of the predecessor Federal Reports Act).

## A. OMB Properly Exercised Its Authority To Eliminate OSHA's Paperwork Requirements That Duplicate Requirements of Other Federal Agencies

OSHA's objective of providing a safe working environment is not served by the massive compilation of paper describing consumer products and drugs that are already subject to detailed labeling requirements concerning use, storage, and hazards. The information OSHA seeks to have generated and disseminated on its behalf is already mandated by the CPSC for hazardous consumer products,<sup>8</sup> the Environmental Pro-

<sup>8</sup>The definition of a "hazardous substance" under the Federal Hazardous Substances Act and the criteria for determining when a product is "hazardous" under the HCS are similar. Compare 15 U.S.C. § 1261(f)(1)(A) with 29 C.F.R. § 1910.1200(d) (1988) and its Appendices A, B, and C. Under the Federal Hazardous Substances Act, a hazardous substance is "misbranded" unless the label:

states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard . . . (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances, (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided . . . (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard.

(footnote continued)

tection Agency (EPA) for pesticides,<sup>9</sup> and the FDA for drugs.<sup>10</sup> On this basis, the Director properly disallowed the application of MSDS requirements to these products as duplicative of information already disseminated, and disseminated more efficiently, pursuant to other federal regulation.

### **B. OMB Properly Determined That HCS Information Collection Requirements Exceeded Those Necessary To Achieve OSHA's Objectives**

In light of the very limited utility to employees of MSDSs concerning consumer products and drugs, any MSDS requirements as applied to these products cannot be regarded as "necessary" to the agency's performance. On this separate and additional basis the Director disallowed the retention and dissemination of information concerning these products. In reaching that decision, the Director properly carried out the express statutory mandate of the Paperwork Reduction Act.

OMB's disapproval of HCS coverage of consumer products, to the extent such products are totally exempt from the EPA-

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15 U.S.C. § 1261(p)(1). As discussed on page 7, *supra*, the information required in an MSDS is similar. Information required by the Federal Hazardous Substances Act, which is distributed to wholesalers and retailers as part of the federally mandated labeling, therefore parallels MSDS requirements under the HCS.

<sup>9</sup>The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, regulates the registration and use of pesticides. Under the authority of FIFRA, EPA has promulgated regulations setting forth the labeling requirements for pesticides. 40 C.F.R. Part 156 (1988). These labeling requirements include the name and address of the producer or registrant of the pesticide, an ingredient statement, warnings or precautionary statements according to the toxicity of the pesticide, and directions for use. 40 C.F.R. § 156.10(a) (1988).

<sup>10</sup>The Federal Food, Drug and Cosmetic Act controls the labeling of drug products. See 21 U.S.C. §§ 352 and 355. FDA has adopted detailed requirements on drug product labeling. See 21 C.F.R. Part 201 (1988).

administered right-to-know provisions of SARA, further supports the conclusion that OMB properly carried out its statutory mandate. As OMB stated, its decision:

makes the OSHA and EPA right-to-know paperwork requirements, which are closely linked, mutually consistent. Using the same exemption in both rules avoids the situation in which employers must separate the paperwork for their "consumer products" into two groups: an OSHA "consumer product" and an EPA "consumer product."

Pet. Writ Cert. 36a. To the extent the HCS went beyond the scope of the SARA right-to-know provisions, it went beyond the minimum needed to accomplish OSHA's goal. As such, it was properly disapproved by OMB.

This Court has recognized that OSHA may be tempted "to impose enormous costs that produce little, if any, discernible benefit." *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) (*Benzene*). To avoid this result, the *Benzene* Court determined that the definition of "safe and healthful employment" under Section 3(8) of the Occupational Safety and Health Act does not empower OSHA "to require . . . absolutely risk-free workplaces whenever . . . technologically feasible. . . ." Instead, the Act allows OSHA to impose costs only to eliminate "significant risks" of harm. *Id.* at 641-42.

Similar concerns underlie the issues in this case. OSHA, left totally on its own, is likely to impose enormous paperwork burdens that produce little, if any, discernible benefit. "[S]ingle mission agencies do not always have the answers to complex regulatory problems" involving issues outside the agency's area of direct focus. *Sierra Club v. Costle*, 657 F.2d 298, 306 (D.C. Cir. 1981) (per Wald, J.). The possibility that OSHA will ignore the burdens the HCS places on firms such

as those represented by *amici* in exchange for minor or hypothetical reductions in risk is completely demonstrated by the circumstances now before this Court.

The purpose of the Paperwork Reduction Act is to ensure that neither OSHA nor any other agency is left entirely on its own when it creates information collection requirements. Instead, OMB is to provide a limited, carefully circumscribed, *but independent*, review of the necessity for the requirement in terms of the agency's mission.

The Paperwork Reduction Act specifically grants the OMB Director the authority to "determin[e] *whether* the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility." 44 U.S.C. § 3504(c)(2) (emphasis supplied). Although the seemingly absolute authority of the Director must be exercised "consistent with applicable law," 44 U.S.C. § 3504(a), and although the statute shall not be interpreted "as increasing or decreasing the authority of the President, [OMB,] or the Director thereof . . . with respect to the substantive policies and programs of departments, agencies and offices," 44 U.S.C. § 351<sup>9</sup>(e), the clear import of the Act is that while an agency retains authority to determine its substantive regulatory objectives, OMB has a statutory responsibility to review whether the agency has chosen effective information collection methods to achieve those objectives.

Far from being an illicit intrusion on OSHA's substantive power, as assumed by the court below, *USWA III*, 855 F.2d at 113, OMB review is a crucial and highly beneficial part of the standard-setting process. "The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative

rulemaking. . . . An over-worked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the argument and ideas of policymakers in . . . the White House." *Sierra Club*, 657 F.2d at 306 (footnotes omitted).

The Paperwork Reduction Act represents a statutory codification of the truism about the administrative process expressed in *Sierra Club*. It also represents a recognition by Congress that judicial review should not be the only safeguard against unnecessary agency action. The ruling of the Third Circuit, if upheld, would make the Act a nullity. OMB would be unable to disapprove any information collection requirements lest someone argue that elimination of the request, no matter how onerous, in some manner impinged, however tangentially, on the agency's substantive mission.

## CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be vacated and OMB's disapproval of the OSHA regulations at issue should be upheld.

Respectfully submitted.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,  
v. *Petitioners,*

UNITED STEELWORKERS OF AMERICA, *et al.*,  
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for the Third Circuit

**BRIEF AMICI CURIAE  
OF ACTION ALLIANCE OF SENIOR CITIZENS,  
GRAY PANTHERS, COALITION OF SENIOR ADULTS,  
AND LEGISLATIVE COUNCIL OF OLDER AMERICANS  
IN SUPPORT OF RESPONDENTS**

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IN SUPPORT OF RESPONDENTS**

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**STATEMENT OF-INTEREST**

The parties submitting this brief amici curiae are petitioners in the case of *Action Alliance of Senior Citizens, et al. v. Sullivan, et al.*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending (No. 88-849). That case presents a question of whether the Paperwork Reduction Act and its statutory predecessor authorize the Office of Management and Budget to overturn a regulation of the Department of Health and Human Services requiring the disclosure of information by third parties as part of the government-wide enforcement of a civil rights law, the Age Discrimination Act of 1975. That law generally prohibits recipients of federal funds from

discriminating against persons because of their age in the provision of services and benefits, and directs the Department of Health and Human Services to promulgate government-wide regulations to effectuate the law. 42 U.S.C. 6103.

The government recognizes that the challenge to OMB's disapproval in *Action Alliance of Senior Citizens* raises issues related to those in this case, and suggests that the Court hold the *Action Alliance* petition pending resolution of this case. Resp. Br. 6, No. 88-849.

Consent of each party to the filing of this brief amici curiae is presented pursuant to Rule 36.2 of the Supreme Court Rules.

### ISSUES PRESENTED

1. Whether a collection of information by an agency subject to review by the Office of Management and Budget under the Paperwork Reduction Act extends to disclosure of information required but not collected by an agency; and

2. Whether OMB authority to disapprove a collection of information by an agency is limited in any respect by the Act's protection for substantive policy entrusted to the agency by law.

### SUMMARY OF ARGUMENT

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, by its terms confines review by the Office of Management and Budget (OMB) to a "collection of information by an agency" of the federal government. 44 U.S.C. 3504(c)(2). An extension of this review authority to disclosure, labeling and similar information which may be required, but not collected, by an agency would strain the Act's language and exceed Congress' intent. It would convert the PRA from its stated purpose of regulating the flow of government paperwork to an en-

tirely different purpose of empowering OMB to supersede an agency's determinations of rights and duties among private individuals and the public under laws entrusted by Congress to the agency.

OMB regulations, which purportedly extend OMB authority under the PRA to the kind of disclosure requirements at issue, are inappropriate for judicial deference. The regulations are not a product of OMB's peculiar expertise, but rather represent an assertion of authority over other federal agencies. Under these circumstances the regulations warrant heightened scrutiny.

Even a finding of authority in OMB over a particular information collection does not conclude the inquiry on judicial review. A court must balance the exercise of OMB authority under § 3508 of the PRA with that reserved to the agencies, specifically, each agency's authority over its own "substantive policies and programs" under § 3518(e) and the requirement that OMB authority be exercised "consistent with applicable law" under § 3504(a). Although the PRA creates a certain inter-agency tension in this regard, its language and legislative history reflect a resolution by allocating to an agency the determination of what information it needs to enforce a statutory mandate and to OMB a responsibility over the manner in which that information is collected. The Court of Appeals recognized this distinction and applied it correctly here.

Finally, the PRA creates an exemption for enforcement of civil rights laws under § 3518(e) which is not observed in practice. It also requires OMB to exercise its authority "consistent with applicable law," § 3504(a), and prohibits resort to the PRA as a method to circumvent agency rulemaking responsibilities under the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* These important limitations in the PRA must be recognized in other litigation pending before the Court.

## ARGUMENT

### I. OMB REVIEW AUTHORITY UNDER THE PRA DOES NOT EXTEND TO DISCLOSURE OF INFORMATION WHICH IS NOT COLLECTED BY AN AGENCY.

The Court of Appeals correctly ruled that a "collection of information" or "information collection request" under the PRA excludes labeling requirements and disclosures made to the public directly rather than to a federal agency. The language, purpose and legislative history of the PRA support this construction.

The starting point is the statute's investing OMB with authority over "the collection of information *by an agency*," 44 U.S.C. 3504(c)(2), 3508 (emphasis added). The PRA defines "collection of information" to mean "the obtaining or soliciting of facts or opinions *by an agency* . . . ." 44 U.S.C. 3502(4) (emphasis added). That language must be regarded as conclusive absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

By enacting the PRA Congress admittedly gave the OMB a broad reach in its oversight of the flow of federal paperwork, and left the outer contours of that reach somewhat murky. Two Congressional concerns appear in the statute and its legislative history which help clarify those contours. On the one hand, Congress desired not to limit the scope of federal paperwork subject to OMB review according to its form. The Senate Committee Report on the PRA noted how "a federal paperwork burden does not depend on how the questions are asked of the respondent, but rather on the fact the Federal government has asked or sponsored the asking of questions." S. Rep. No. 930, 96th Cong. 2d Sess. 39, *reprinted in* [1980] U.S. Code Cong. & Adm. News 6241, 6279 ("Senate Report"). Thus the PRA defines broadly the instruments for collection of information by a federal

agency, including such instruments as reporting and record-keeping requirements.<sup>1</sup>

On the other hand, Congress framed the PRA around the collection of information by the Federal government. *Id.* The statute's own statement of purposes in each instance is tied explicitly to *federal* activity. 44 U.S.C. 3501(1)-(6). The legislative history, while imprecise on this point, suggests a Congressional intent to tie "record-keeping requirements" under the PRA to "a means of soliciting facts or opinions by an agency" and not to cover record-keeping as a free-standing activity of private parties where the agency has no role in transmittal. Senate Report, 38, 40.<sup>2</sup> Congress's intention was more limited:

As the committee made clear in its report, the only circumstances under which collections of information are considered to be conducted or "sponsored" by a Federal agency are where: First, the agency itself conducts the collection; second, the agency uses a procurement contract to obtain information by way of a contractor; or third, the terms and conditions of a grant or cooperative agreement specifically require

<sup>1</sup> The government's emphasis on the OMB authority over "information collection requests," including reporting and record-keeping, 44 U.S.C. 3504(c)(1), is misdirected. Pet. Br. 20-21. The PRA defines "information collection request" by enumerating various methods "calling for the collection of information." 44 U.S.C. 3502(11). Such requirements as reporting and record-keeping, therefore, do not stand independently as activities subject to OMB review, but as instruments to be used in the collection of information by an agency under the Act.

<sup>2</sup> Congress anticipated coverage of certain information filed with an agency, such as the Securities and Exchange Commission, for ultimate disclosure to the public rather than for internal statistical use. Senate Report at 29-40. Nonetheless, collection by the agency, or maintenance for future collection triggers PRA coverage; no clear indication of coverage is made for disclosure of information which is not ultimately collected by the agency. *Id.*

that collections of information be subject to the clearance requirements of the act.

126 Cong. Rec. 30,191 (1980) (Remarks of Senator Danforth).

The purpose of the PRA is not served by an extension of its scope to disclosure and labeling requirements. The PRA represents an effort by the federal government to rationalize its own flow of information by ascertaining the need for information and by avoiding duplicative or burdensome requirements in collecting it. Federal information "paperwork" is the element being regulated. This objective is distant from the objective, in the government's view, of empowering OMB to regulate duties and rights among private individuals and the public, especially with laws affecting public health, safety, welfare or civil rights. In this area public protection through disclosure is central to the activity being regulated, and federal paperwork is incidental to it.

The government argues that the PRA covers all federal disclosure requirements, with or without federal agency collection, covering activities as diverse as housing inspections to hearing aids and funeral services. Pet. 18. Under this view, virtually any private party subject to a labelling or a disclosure requirement could challenge that requirement by discovering a data-gathering or recordkeeping chore which the requirement might entail but which lacks the specific imprimatur of OMB. Nothing in the PRA suggests that Congress envisioned OMB's playing so dramatic a role.

The government seeks shelter for its broad view in OMB's own regulations under the PRA<sup>3</sup>, asking defer-

<sup>3</sup> OMB regulations list certain statutory exemptions from coverage but omit outright limitations under § 3518(e). 5 C.F.R. 1320.3. The regulations increase OMB authority over a variety of information which is not collected by a federal agency, but which is disclosed to other persons. See 5 C.F.R. 1320.7(r) ("record-

ence to them under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Such deference is inappropriate. This Court emphasized in *Chevron* that

[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843 & n.9 (citations omitted). As shown above, Congressional intent differs from the OMB construction and must be given effect here.

Moreover, *Chevron* deference is accorded to an agency's "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" and where "a full understanding of the force of the statutory policy in the given situation has depended on more than ordinary knowledge respecting the matters subjected to agency regulations." 467 U.S. at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961) (emphasis added)). Here, OMB is not practicing its expertise on technical matters solely within its competence, but is resolving a conflict in authority between itself and other agencies. This resolution falls outside the *Chevron* rationale and invites scrutiny rather than deference.

This principle is illustrated in this case. The Secretary of Labor, in the administration of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, exempted from the labeling requirement for hazardous materials those products used in the workplace in a manner similar to the way the products would be used by

keeping"), 1320.7(s) ("reporting"), and 1320.7(t) ("sponsor"). These additions are cut from whole cloth and are foreign to the PRA.

consumers and drugs subject to labeling under federal food and drug laws. Pet. App. 10a. This standard serves the central purposes of the underlying statute by enhancing workplace safety. 29 U.S.C. 651(b). Moreover, it imposes no direct obligation on manufacturers to collect information. Any paperwork burden would be slight and incidental to the achievement of the statutory mandate of OSHA.<sup>4</sup>

Nothing in the language or purposes of the PRA history supports the broad definitions of review authority being urged by OMB. The Court of Appeals correctly ruled that disclosure and labeling requirements imposed on a third party do not constitute a "collection of information by an agency." 44 U.S.C. 3504(c) (2).

## II. OMB REVIEW MUST BE EXERCISED IN HARMONY WITH SECTION 3518(e) AND MUST BE "CONSISTENT WITH APPLICABLE LAW."

### A. The PRA Does not Authorize OMB to Veto an Agency's Determination of What Information Is Necessary to Fulfill its Statutory Mandates.

Even if the PRA applies to disclosure or labeling of information which is not collected by a federal agency, that would not conclude the inquiry here. A reviewing court then must balance OMB authority under § 3504 with an agency's authority over substantive policy under § 3518(e). The Court of Appeals correctly ruled that the PRA does not "allow OMB, in the guise of regulating

<sup>4</sup> This consideration applies as well to the substantive agency policy at issue in *Action Alliance of Senior Citizens v. Sullivan*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. The case involves an agency requirement of record keeping, but not transmittal to the agency, as a pivotal element in the agency's enforcement of a civil rights statute. 43 Fed. Reg. 56,437 (Dec. 1, 1978); 44 Fed. Reg. 33,770 (June 12, 1979). The Court of Appeals incorrectly deemed this to be a collection of information by a federal agency subject to OMB review. 846 F.2d 1453-54.

collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies." Pet. App. 10a.

The language of the PRA allocates to the agencies the authority to determine what information they need for statutory enforcement and allocates to OMB the authority to review the method for collecting that information. It provides that the authority of the Director of OMB "shall be exercised consistent with applicable law," 44 U.S.C. 3504(a), and that "[n]othing in this [Act] shall be interpreted as increasing or decreasing the authority of the [OMB] with respect to the substantive policies and programs of departments, agencies and offices . . . ." 44 U.S.C. 3518(e). However, the PRA also permits OMB to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency . . . ." 44 U.S.C. 3504(c) (2).

The government urges that OMB authority under this section take precedence over the exercise of substantive authority by any agency subject to the PRA. Once OMB review attaches, the argument goes, the OMB determination becomes absolute and final.<sup>5</sup> The OMB determination of what information is "necessary" supercedes the agency's own determination of what is necessary to carry out its statutory duty. Pet. Br. 33.

The government's view of the OMB's authority under section 3504(c) (2) ignores the Act's critical tension between the agencies' independent duties and OMB respons-

<sup>5</sup> The Court of Appeals in *Action Alliance of Senior Citizens*, *supra* n.4, adopted the government's position by confining its inquiry to whether OMB review had involved a "collection of information" under the PRA, and by refusing to read § 3518(e) as imposing any limitations on OMB in the exercise of its authority. 846 F.2d at 1454-55.

ibility. It renders as surplusage the PRA's restraints on OMB authority. Moreover, that view ignores this Court's frequent injunction against reliance on the literal language of a statute where such reliance would defeat the law's plain purpose, *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983), or would not be consistent with the "sense of the thing," *Heckler v. Edwards*, 465 U.S. 870, 879 (1984). The "sense of the thing" under the PRA is not to view it as a Congressional decision to erode other statutory objectives. When Congress enacts a statute and entrusts an agency with its enforcement, Congress cannot be presumed in the PRA to have empowered the OMB to veto any decision by the agency involving information needed for enforcement of other Congressional enactments.

The PRA scheme resolves paperwork review with other law: On the one hand, Congress intended that an agency retain its authority to determine what information is necessary to the effective enforcement of a law entrusted to it. The OMB, on the other hand, can review the method by which that information is collected. In this way the PRA's dual purposes of creating paperwork oversight and maintaining independent agency policy can be harmonized.<sup>6</sup>

However, the PRA does not confer unfettered discretion in OMB to overrule an agency's decision over what information it needs. Rather, it imposes an objective standard of "whether the collection of information is necessary for the proper performance of the function of the

<sup>6</sup> One commentator would resolve the PRA and competing statutory mandates by requiring the OMB on judicial review to demonstrate that practical alternatives to the agency's information gathering exist which are less burdensome to the respondents and yet produce the information the proposing agency deems necessary. Note, *The Paperwork Reduction Act in United Steelworkers v. Pendergrass: Undue Restriction and Unrealized Potential*, 89 Colum. L. Rev. 820, 933 (1989).

agency. . ." 44 U.S.C. 3504(c)(2). OMB inquiry is limited to whether the information sought is related to the agency's legitimate functions and, if so, to the manner in which it is collected. It may disapprove a collection which is duplicative, or which is more burdensome than an available alternative or, in all events, OMB can make suggestions short of disapproval.<sup>7</sup> OMB is authorized to review "information" itself, in contrast to its "collection," according to its "practical utility." *Id.* This is a narrow inquiry, however, confined to "the ability of the agency to use the information it collects, particularly the capability to process such information in a timely and useful fashion." 44 U.S.C. 3502(16). Congress did not empower OMB to veto any agency policy, or any agency determination about its need for information, under the aegis of reviewing how that information is collected.

The present case illustrates an OMB disapproval beyond the delineations of the PRA. OMB did not disapprove the OSHA standards at issue because they were unrelated to the "proper performance of the functions" of OSHA. *Id.* Indeed, the standards are central to the agency's statutory responsibilities for ensuring workplace safety under 29 U.S.C. 655. OMB did not find that the information at issue lacked "practical utility" in terms of "the ability of the agency to use the information it collects," 44 U.S.C. 3502(16), because the information at issue is not even being collected by the agency. Instead, OMB rendered its disapproval after substituting its judgment for that of the agency by focusing on the interest of employers regulated under the OSH Act. Pet. Br. 30a-37a. This exceeds OMB responsibilities under the PRA.

An equally glaring substitution of OMB judgment for agency judgment arises in *Action Alliance of Senior Citi-*

<sup>7</sup> OMB authority over agency budget requests assures that such suggestions will not fall on deaf ears. See 31 U.S.C. 1101 et seq.

zens, *supra* n.4. OMB disapproved a self-evaluation requirement imposed on recipients of federal funds in government-wide regulations implementing the Age Discrimination Act, 42 U.S.C. 6101 *et seq.* Although not collected by a federal agency, the self-evaluation would be made available to the agency and to the public for a period of three years. 45 C.F.R. 90.43(b). OMB did not challenge the regulation's relationship under § 3504(c)(2) to the "proper performance of the functions" of the Department of Health and Human Services, which promulgated the rule under 42 U.S.C. 6103(a)(3). Rather, OMB disapproved the regulation, without analysis, because HHS had not demonstrated its practical utility, alternative methods available, and the burden it would impose. Pet. App. 48a-49a, No. 88-849. This exercise by OMB, like that in the present case, ventures well beyond paperwork review and into areas of judgment entrusted by law to the agencies.

Legislative history emphasizes this exemption. Congress adopted § 3518(e) explicitly to limit the authority of OMB over substantive agency policies and programs. The Senate made this clear in its bill at the time of passage of the PRA:

Section 3518(e) provides that the bill does not affect in any way the powers of the President or OMB respecting the substance of agency policies. Thus [the Senate bill] draws an important distinction between paperwork management and substantive decisions.

Senate Report at 56. See 126 Cong. Rec. 30,192 (1980) (Remarks of Senator Javits in floor debates).

Inherent limitations on OMB authority are emphasized by the Act's provision for judicial review of an OMB action disapproving an agency collection request. The PRA proscribes judicial review of an OMB decision "to approve or not to act upon a collection of information requirement" but leaves open to review a decision by

OMB to disapprove such a requirement. 44 U.S.C. 3504(h)(9). This is buttressed by the presumption favoring judicial review absent a Congressional intention to withhold it. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 157 (1970).<sup>8</sup>

**B. Section 3518(e) Constitutes an Exemption for the Collection of Information in the Enforcement of Civil Rights Laws.**

The PRA enumerates particular exemptions to the OMB authority in review of federal paperwork in specific areas, including the conduct of a federal criminal investigation, a civil action to which the United States is a party, the service of compulsory process, the conduct of intelligence activities, and enforcement of the civil rights laws.<sup>9</sup> These exceptions operate as statutory exemptions independent of the general scope of OMB review under the PRA and the general power of OMB to affect substantive agency policy.

<sup>8</sup> By contrast, the Regulatory Flexibility Act specifically prohibits all judicial review. 5 U.S.C. 611 (1982). Review of OMB disapproval of an agency's procedure is appropriate under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706 (1982). See 89 Colum. L. Rev. at 933-34. This standard permits a greater degree of judicial scrutiny than obtains under traditional deference to the agency's determination, lest OMB be allowed to infringe on mandates of other agencies to an extent not contemplated in the Act, and lest deference to the OMB effectively nullify deference to the original agency in its determination of substantive policy. *Id.* at 936-37.

<sup>9</sup> 44 U.S.C. 3518. § 3518(e) provides:

Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

In another case pending before the Court, OMB is attempting to supercede a statutory exemption. *Action Alliance of Senior Citizens*, *supra* n.4, involves an asserted OMB veto of an information requirement in an agency regulation promulgated explicitly for the purpose of civil rights law enforcement, and which regulation the agency thereafter failed to enforce explicitly on the basis of the PRA. 47 Fed. Reg. 57,852 (1982). Amici, who are petitioners in that case, seek recognition for the statutory exemption for civil rights law enforcement in any interpretation of OMB power under the PRA.

Section 3518(e) reflects Congressional intent to exempt civil rights law enforcement efforts from an OMB veto, although not necessary from OMB comment, in the operation of the PRA. Floor debates on the Senate bill, which added this exemption, affirm this intent.

Civil rights programs, unlike many of the other programs covered by this bill, are grounded in fundamental constitutional rights. As such, they are entitled to every possible protection from political interference. Further, many of these programs simply cannot be enforced without the collection of data. Even if the information requested may seem burdensome to some, its collection is especially important in the area of civil rights. I have no objection to OMB reviewing information requests from civil rights or any other agencies to assure that the information is collected in the least burdensome manner consistent with the statutory purpose, and is not duplicative. But I will not idly stand by if it appears that any substantive civil rights program is being sacrificed. I do not believe the bill permits this, and that is why I can support it.

126 Cong. Rec. 30,192 (1980) (Remarks of Senator Javits).

These concerns led directly to an amendment to § 3518(e) clarifying the exemption for civil rights law

enforcement as explained by its sponsor, Senator Kennedy.

As Chairman of the Senate Judiciary Committee—the committee which has primary responsibility for the civil rights laws—I was also concerned about the impact of this legislation on civil rights enforcement. Therefore, I proposed another amendment, which was accepted by the Governmental Affairs Committee, to clarify section 3518(e) to show that nothing in the act will affect the substantive authority and responsibility of the Justice Department and of the Equal Employment Opportunity Commission or any other Federal agency under law or executive order to enforce the civil rights laws of the United States and to supervise the enforcement of the civil rights laws by other departments and agencies of the Federal Government.

126 Cong. Rec. 30,178 (1980) (Remarks of Senator Kennedy). Senator Chiles, the bill's principal sponsor, explained the effect of this amendment:

In amending the section 3518 exemptions to include civil rights enforcement actions, it should be understood that the scope of the exemption is similar to the scope of the exemptions currently provided in the bill for other enforcement activities. In other words, section 3518, as amended, would make a distinction between specific information collection requests associated with civil rights enforcement actions which would be exempt from OMB review, and other more general information requests by agencies charged with enforcing the civil rights laws, which would still be subject to OMB review. The mere fact that an information request is being issued by an agency charged with enforcing the civil rights laws does not exempt it from OMB review. The key consideration in terms of the section 3518 exemption is that the request itself be related to a specific enforcement action.

*Id.* (Remarks of Senator Chiles). The House accepted the Senate amendment to § 3518(e). *Id.* at 31,228.

The OMB has chosen to ignore both the plain language of § 3518(e) and the Congressional purpose behind it.<sup>10</sup> Nonetheless, the statute's language must be given full effect: Information collection associated with civil rights enforcement is not subject to OMB disapproval under the PRA.

**C. The PRA Does not Authorize OMB to Abrogate Other Law in its Review of Information Collection.**

The PRA provides that the authority of the Director of the OMB under the Act shall be exercised "consistent with applicable law." 44 U.S.C. 3504(a). The plain meaning of this text is reinforced by § 3518(e) that the Act does not change OMB authority "with respect to the substantive policies and programs of departments, agencies and offices." In this case the exercise of OMB authority "consistent with applicable law" means, at a minimum, that a federal agency subject to a final court order, directing it to complete rulemaking by a date certain, may not rely on an OMB disapproval under the PRA as grounds to disobey that order.

Similarly, a judicial construction of OMB authority exercised "consistent with applicable law" must recognize that such authority may not operate outside the ambit of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.*, under the PRA or its predecessor. Amendments to the PRA were designed explicitly to withhold OMB authority "to overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency" and to withhold

<sup>10</sup> OMB regulations under PRA list other exemptions under § 3518 but omit civil rights law enforcement under § 3518(e). 5 CFR 1320.3 (1983). This omission is unexplained in the rulemaking history. 47 Fed. Reg. 39,519 (1982) (Notice of Proposed Rulemaking); 48 Fed. Reg. 13,665-675 (1983) (final rule).

OMB authority "to overturn that agency decision without even requiring OMB to justify its decision publicly." 126 Cong. Rec. 30,178 (1980) (Remarks of Senator Kennedy.) Thus, the PRA prevents OMB from disapproving a collection request contained in an agency rule unless OMB first comments on the rule and then finds that the agency response is "unreasonable." 44 U.S.C. 3504(h) (5).

The government itself recognizes that existing agency regulations were immune from OMB review following passage of the PRA.<sup>11</sup> However, in litigation the government fails to acknowledge this position, maintaining instead that an OMB disapproval memorandum may operate as a secret rescission of a published agency rule. In *Action Alliance of Senior Citizens*, *supra* n.4, the OMB disapproved a final regulation of the Department of Health and Human Services in its enforcement of the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* The OMB disapproval came in an unpublished memorandum dated February 14, 1980,<sup>12</sup> eight months after

<sup>11</sup> An Opinion of the Office of Legal Counsel in the Justice Department concluded that existing regulations were immune from review but that OMB could initiate proposals for changes in regulations and agency procedures under 44 U.S.C. 3504(b) (2). The OMB used this authority to direct agencies to initiate new rulemakings over certain information collections. 89 Col. L. Rev. at 928 & n.63. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 45 & n.248 (1987).

<sup>12</sup> The date of the OMB disapproval memorandum on February 14, 1980, prior to the effective date of the PRA on April 1, 1981, 44 U.S.C. 3501 note, is not consequential to its analysis under PRA standards. HHS referred only to the PRA when it first announced its abandonment of the self-evaluation requirement in its own regulation. 47 Fed. Reg. 57,852 (1982). Both the PRA and its predecessor, the Federal Reports Act, 44 U.S.C. 3501 (1976), deal with the collection of information by federal agencies, the scope of which remained the same under both statutes. Senate Report at 39. The substantive authority of OMB remains the same under both laws. 846 F.2d at 1453.

publication of the HHS final rule. 846 F.2d at 1453. HHS did not formally rescind this regulation but simply refused to enforce it, supplying public notice of its action for the first time nearly three years later in a one-sentence reference to the PRA. 47 Fed. Reg. 57,858 (December 28, 1982).

The requirement that OMB review the flow of federal paperwork "consistent with applicable law" serves an important Congressional purpose. To secure this purpose, OMB authority must be construed in a manner which preserves the integrity of both judicial and administrative procedures enshrined in other law.

#### CONCLUSION

This Court should affirm the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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